RULE TO SHOW CAUSE—December 12, 1958

This matter comes before the Court on the petition of counsel for H. Leslie Atlass, filed herein on December 11, 1958, for a writ of mandamus or prohibition.

On consideration whereof, it is ordered that respondents show cause, if any there be, why a writ of mandamus or prohibition should not issue as prayed by filing in the Office of the Clerk of this Court an original and four (4) copies of their response, and briefs if any, to this Rule on or before December 29, 1958.

It is further ordered that the order for the taking of the depositions of H. Leslie Atlass, Frank Johnson, Robert L. Smith and John Wasilas entered on November 24, 1958, by the respondent Hon. Julius H. Miner, in cause Number 57 C 722 be, and it is hereby, stayed until the further order of this Court.

[fol. 71]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Heard Feb. 3, 1959 by
Duffy, C.J., Hastings, C.J., Parkinson, C.J.

[Title omitted]

ANSWER OF RESPONDENTS, HON. JULIUS H. MINER AND HON. EDWIN A. ROBSON, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION —Filed January 12, 1959

Now come the respondents, Hon. Julius H. Miner and Hon. Edwin A. Robson, Judges of the United States District Court for the Northern District of Illinois, by Robert W. Macdonald, their attorney, and pursuant to Rule 19 of the Rules of this Court make the following answer and response to the petition heretofore filed in the above cause:

1. The respondents admit the matters alleged in paragraph 1 of the petition.

2. The respondents admit the matters alleged in paragraph 2 of the petition.

[fol. 72] 3. The respondents admit the matters alleged in paragraph 3 of the petition, but neither admit nor deny that said exoneration is made pursuant to the statutes of the United States specified therein.

4. The respondents herein admit that the claimants in Case No. 57 C 722 pending in the United States District Court served notices and motions on the petitioner to take petitioner's deposition and the depositions of Frank Johnson, Robert L. Smith and John Wasilas for discovery, as provided in said motions, the same being identified in the Appendix filed in this Court at pages 5 through 16, and that said motions were for the purpose of taking said depositions for discovery as stated in said motions, but the respondents expressly deny that said depositions of the persons therein specified were sought under "Rules 25, 28 and 30 of the Federal Rules of Civil Procedure," and in support of said denial respondents further state the fact to be, as expressly stated in claimants' motion filed on February 7, 1958, said depositions of said persons were to be taken "pursuant to Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil Procedure," and further that the specification of said Rules 26, 28 and 30 of the Federal Rules of Civil Procedure were included in said motion not as a substantive right in admiralty, but as a procedural [fol. 73] guide to determine the method and means of taking such discovery depositions in admiralty as expressly provided in the text of Admiralty Rule 32 to the effect that "the taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure, except as otherwise provided by statute * * *"

5. The respondents admit that said cause was assigned to Judge Julius Miner and reassigned to Judge Robson, as alleged in said paragraph, and further state that the nature of the oral arguments made by the petitioner before Judge Miner is set forth in the Appendix at pages 19 through 41, and respondents therefore neither admit nor deny peti-

tioner's allegations concerning the nature of his oral arguments, except said respondents deny any and all conclusions set forth in said allegations and state the fact to be that said arguments are self-evident, as shown by the transcript of the proceedings thereof.

Respondent Judge Miner specifically denies that he ruled that he would apply the Federal Rules of Civil Procedure in said Admiralty cause, and respondents further state the fact to be that Judge Miner entered the order, alleged to be in dispute, pursuant to claimant's motion under Admiralty Rule 32 and any reference made by the respondents (App., p. 26) to the Federal Rules of Civil Procedure was for the [fol. 74] purpose of using or following a procedure in Admiralty as expressly authorized and permitted under District Court Admiralty Rule 32. Respondents deny that the Federal Rules of Civil Procedure were, as such, applied in Admiralty to determine the substantive or procedural rights of the parties, but were used only as a guide or method to be followed in Admiralty for the taking of said depositions.

6. The respondents admit that the Federal Rules of Civil Procedure pursuant to Rule 81(a) "do not apply to proceedings in Admiralty." The respondents further admit that R. S. 863 of the Revised Statutes of the United States permits the taking of depositions in Admiralty, but further state the fact to be that said statute does not exclusively govern the deposition procedures in Admiralty. The respondents further admit that the Supreme Court of the United States has not passed an Admiralty Rule similar to Rule 26 of the Federal Rules of Civil Procedure, but the respondents deny any and all inferences or conclusions sought to be made by the allegations of paragraph 6 of the petition or any other paragraph contained therein.

7. The respondents admit that the petitioner filed on November 24, 1958, certain affidavits, as alleged in para- [fol. 75] graph 7, purporting to show the compliance or noncompliance with certain conditions, all as set forth in said affidavits attached to said Appendix (pp. 2-4), but the respondents deny all conclusions and other matters alleged in paragraph 7.

8. The respondents admit that the District Court for the Northern District of Illinois has promulgated certain admiralty rules, including Rule 32 thereof, and that said admiralty rules provide for the taking of depositions, as stated therein.

9. The respondents admit that an order was entered on November 24, 1958, by the respondent Julius H. Miner, a portion of said order being alleged in said petition, and that a copy of said order appears in the Appendix filed herein.

The respondents deny that said order is in excess of any power granted to the District Court, and further denies that it is beyond its jurisdiction or that it is in direct contravention of R. S. 863 or any other statute of the United States or Supreme Court rule, admiralty or otherwise, and further deny that it is in contravention of Rule 81(a) of the Rules of Civil Procedure or that said order or Admiralty Rule 32 or any other admiralty rule of the District Court [fol. 76] for the Northern District of Illinois is in excess of power granted to said Court, as authorized in 28 U.S.C.A. §2071 or Supreme Court Rule 44, or that said order is in excess of any power residing in the United States District Court sitting in Admiralty, and further respondents deny each and every fact, inference or conclusion alleged in paragraph 9. In further answer to paragraph 9 of the petition, respondents state the fact to be that said order entered by the respondent Judge Julius H. Miner on November 24, 1958, was in accord with, authorized by, and not in derogation of any statutes of the United States or Supreme Court rule.

10. The respondents deny that the petitioner has exhausted every means available to secure the procedure prescribed by law and the Supreme Court, and further deny that petitioner has any right to ask this Court to exercise its supervisory powers over District Court procedures, particularly those which were followed and adopted by the respondents in this case in the United States District Court, and further deny that such procedures were adopted in excess of power or that any error was committed by respondents in entering said order or following Admiralty Rule 32. The respondents further deny that a writ of mandamus

or prohibition should issue from this Court, and in support [fol. 77] thereof file a Memorandum in Support of and in Opposition to Petitioner's Petition and Memorandum in Support Thereof, and respondents further deny all facts, conclusions and inferences alleged in paragraph 10 of said petition.

Wherefore, the respondents pray that the petition filed in the above-entitled cause for a writ of mandamus or prohibition be denied and that a writ of mandamus or prohibition not issue out of this Court to the respondents, and further respondents pray that an order be entered granting to the respondents such other relief as is required in law, equity or admiralty.

Dated: January 12, 1959.

Robert W. Macdonald, Seyfarth, Shaw, Fairweather & Geraldson, Proctors for Hon. Julius H. Miner and Hon. Edwin A. Robson, Judges of the United States District Court for the Northern District of Illinois, Respondents.

Of Counsel: Seyfarth, Shaw, Fairweather & Geraldson, 231 South La Salle Street, Chicago 4, Illinois, Franklin 2-7810 (Proctors for claimant Catherine Muth).

Harris & Raszus, Director & Liebenson, One North La Salle Street, Chicago 2, Illinois, Randolph 2-9242 (Proctors for claimant Mollie Darr).

[fol. 78] *Duly sworn to by Robert W. Macdonald, jurat omitted in printing.*

[fol. 79] Affidavit of Service of Respondents' Answer and Memorandum in Support Thereof (omitted in printing).

[fol. 80] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Heard Feb. 3, 1959 by
Duffy, C.J., Hastings, C.J., Parkinson, C.J.

[Title omitted]

REPLY MEMORANDUM OF JUDGES JULIUS H. MINER AND EDWIN A. ROBSON, RESPONDENTS, TO PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION —Filed January 12, 1959

Statement of Facts

I. Nature of Case and Ruling in the District Court.

Petitioner, H. Leslie Atlass, has petitioned this Court to issue a Writ of Mandamus or Prohibition to the Hon. Julius H. Miner and Hon. Edwin A. Robson and any other Judge of the United States District Court for the Northern District of Illinois, prohibiting the enforcement of an order entered by the Hon. Julius H. Miner, directing the petitioner to submit to oral discovery deposition, in an Admiralty proceeding presently pending in the U. S. District Court.

The order requiring petitioner (and others) to submit to oral discovery deposition was entered pursuant to motions [fol. 81] made by Catherine E. Muth and Mollie Darr (complainants in Admiralty Case No. 57 C 722) filed on February 7 and 9, March 9, March 27, May 7 and 9, and October 21, 1958. (App., pp. 5-16).

The motion asking for an order granting complainants leave to take oral depositions was made "pursuant to Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil Procedure" (App. p. 6), and a subsequent motion that the Court "enter an order allowing claimant to take the discovery deposition of H. Leslie Atlass and others, as set out in claimant's motion heretofore filed in this cause" (App., p. 9).

The order entered by respondent Judge Miner provides that claimants be given leave to take the deposition of

H. Leslie Atlass (and others) on December 16, 1958, before a notary public at a fixed time and place (App., p. 1). It is to the enforcement of this order in Admiralty which petitioner seeks a Writ of Mandamus or Prohibition in this Court. The petition urges the proposition that (1) discovery depositions cannot be taken in Admiralty, and (2) the order was "in excess of any power" granted to the Court. Petitioner seeks to support this contention by alleging that the court below ordered the depositions "under the authority of the Federal Rules of Civil Procedure" (par. 5) which "do not apply in Admiralty" (par. 6). Petitioner also alleges that the only depositions permissible in Admiralty are depositions *de bene esse* because there is a federal statute providing for the taking of depositions *de bene esse* which petitioner must necessarily argue is exclusive and is the only method of taking depositions in Admiralty and [fol. 82] there is no Supreme Court Admiralty Rule similar to Rule 26 (oral discovery deposition rule) of the F.R.C.P. Further, the petition attacks not only the validity of the order and the power of the Court to enter the order, but also the validity of District Court Admiralty Rule 32 under which the order was entered. It is contended that Admiralty Rule 32 is "in excess of power" granted to the District Court by the act of Congress permitting the District Court "to prescribe rules for the conduct of their business" as well as "in excess of power" granted under Supreme Court Admiralty Rule 44 providing that in Admiralty cases "not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

Thus, the court below is alleged to have acted "in excess of any power" granted so as to warrant the extraordinary remedy of mandamus or prohibition to correct an alleged wrongful usurpation of power by the District Court sitting in Admiralty.

Contested Issues

The contested issues in this case are:

1. Whether, as a matter of law, discovery depositions of parties litigant may be ordered by a Judge of the

District Court sitting in Admiralty, pursuant to Rule 32 of the Admiralty Rules of the U. S. District Court (Northern District).

[fol. 83] 2. Whether, as a matter of law, the entry of an order in Admiralty for discovery depositions, pursuant to Admiralty Rule 32, constitutes such an exercise of arbitrary excess of power that the extraordinary remedy of a Writ of Mandamus or Prohibition will lie.

Points and Authorities

I. The District Court Admiralty Rule 32 Permitting the Taking and Use of Discovery Depositions Is a Legal and Valid Rule Enacted by the District Court Pursuant to Authority Granted by Rule 44 of the Supreme Court Admiralty Rules and by Acts of Congress, 28 U.S.C.A. § 2071, 2073.

A. The Authority of the Federal District Court to Enact and Enforce Admiralty Rule 32 is Created and Granted by Acts of Congress (28 U.S.C.A. 2071, 2073) and Supreme Court Admiralty Rule 44.

28 U.S.C.A. § 2073

28 U.S.C.A. § 2071

Sup. Ct. Admiralty Rule 44, 28 U.S.C.A.

B. Admiralty Rule 32 of the U. S. District Court was Promulgated Pursuant to the Authority Granted by Congress and the U. S. Supreme Court Admiralty Rule 44.

Sup. Ct. Admiralty Rule 44, 28 U.S.C.A.

Nor. Dist. of Ill., Local Admiralty Rule 32

Benedict on Admiralty, Vol. V.

C. District Court Admiralty Rule 32 Being a Valid Legal Promulgation of the District Court's Rule Making Power in Admiralty Under Supreme Court Rule 44, Any Orders Entered Thereunder are Both a Necessary and Proper Exercise of Admiralty Judicial [fol. 84] Power and are Neither Contrary to nor in

Violation of any Admiralty Supreme Court Rule or U. S. Statute.

1. District Court Admiralty Rule 32 is not Violative of or "in Excess of Power" of any Supreme Court Rule, but is a Proper Exercise of Rule Making Authority Under Supreme Court Rule 44.

   S. Ct. Admiralty Rules 44, 32C, 28 U.S.C.A.

   Dowling v. *Isthmian S.S. Corp.*, 184 F. 2d 758 (C.A. 3, 1950)

   Brown v. *Isthmian Steamship Corp.*, 79 F. Supp. 701 (E.D., Pa., 1948)

   The Ballantrae, 1949 AMC 1999 (D.C., N.J.)

   Galterin v. *U.S.*, 1949 AMC 1907 (E.D., N.Y.)

   Bunge Corp. v. *Gounaris*, 1949 AMC 744 (S.D., N.Y.)

   Ludena v. *The Santa Luisa*, 95 F. Supp. 790 (S.D., N.Y., 1951)

   Republic of France v. *Belships Co., Ltd.*, 91 F. Supp. 912 (S.D., N.Y., 1950), *mandamus den.* 184 F. 2d 119 (C.A. 2, 1950)

2. An Order for Oral Discovery Deposition Entered Pursuant to District Court Admiralty Rule 32 is not Violative of or in Derogation of Any Act of Congress, Particularly the Statute Allowing *de bene esse* Depositions in Admiralty (R.S. 863).

   Dowling v. *Isthmian S.S. Corp.*, 184 F. 2d 758 (C.A. 3, 1950)

   Nor. Dist. of Ill., Local Admiralty Rule 32

   Ludena v. *The Santa Luisa*, 95 F. Supp. 790 (S.D., N.Y., 1951)

   [fol. 85] *Republic of France* v. *Belships Co., Ltd.*, 91 F. Supp. 912 (S.D., N.Y., 1950), *mandamus den.* 184 F. 2d 119 (C.A. 2, 1950)

3. District Court Rule 32 and Any Order Entered Thereunder is not Violative of, Repugnant to, or

"In Excess of Power" of Rule 81(a) of the Federal Rules of Civil Procedure Which Provides That "the F.R.C.P. Shall Not Apply to Proceedings in Admiralty."

Nor. Dist. of Ill., Local Admiralty Rule 32

Darling's Estate v. *Atlantic Contracting Corp.*, 150 F. Supp. 578 (E.D., Va., 1957)

II. As a Matter of Law, the Petition for Writ of Mandamus or Prohibition Should Be Denied.

Ex Parte Fahey, 67 S. Ct. 1558 (1947)

Bankers Life & Casualty Co. v. *Holland*, 74 S. Ct. 145 (1953)

U. S. Alkali Export Assn. v. *U. S.*, 65 S. Ct. 1120 (1945)

Alcoa Steamship Co. v. *Ryan*, 211 F. 2d 576 (C.A. 2, 1954)

Gulf Research & Development Co. v. *Leahy*, 193 F. 2d 302 (C.A. 3, 1951)

Belships Co., Ltd. v. *The Republic of France*, 184 F. 2d 119 (C.A. 2, 1950)

O'Malley v. *Chrysler Corp.*, 160 F. 2d 35 (C.A. 7, 1947)

[fol. 86] Argument

I. The District Court Admiralty Rule 32 Permitting the Taking and Use of Discovery Depositions Is a Legal and Valid Rule Enacted by the District Court Pursuant to Authority Granted by Rule 44 of the Supreme Court Admiralty Rules and by Act of Congress, 28 U.S.C.A. §§2071, 2073.

A. The Authority of the Federal District Court to Enact and Enforce Admiralty Rule 32 is Created and Granted by Acts of Congress (28 U.S.C.A. §§ 2071, 2073) and Supreme Court Admiralty Rule 44.

The Congressional delegation of power to the Supreme Court (28 U.S.C.A. § 2073) to regulate practice in the Admiralty Courts, originally granted by Congress in 1842, provides:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the District Courts of the United States and all courts exercising admiralty jurisdiction in the territories and possessions of the United States.
>
> "Such rules shall not abridge or modify any substantive right.
>
> "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.
>
> "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court."

Congress has similarly delegated rule making power to the District Courts (28 U.S.C.A. § 2071). The statute reads:

> [fol. 87] "The Supreme Court and all courts established by act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 44 of the Supreme Court Admiralty Rules authorizes District Courts sitting in Admiralty to regulate their practice in all cases not provided for by the Rules or Statute. Rule 44 reads as follows:

> "In suits in admiralty and all cases not provided for by these rules or by statute, the District Courts

are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

It is significant to note that these acts of Congress and the Supreme Court Admiralty Rules are not "prohibitive" or "preventive" in nature. On the contrary, they are "permissive" laws specifically delegating authority, rule making power, and legislative prerogatives.

B. Admiralty Rule 32 of the U. S. District Court Was Promulgated Pursuant to the Authority Granted by Congress and U. S. Supreme Court Admiralty Rule 44.

Under the authority granted by U. S. Supreme Court Admiralty Rule 44 and the acts of Congress, the District Court for the Northern District of Illinois has enacted thirty-three Admiralty Rules covering various subjects of practice which have been traditionally identified with procedures and matters in Admiralty. Among these Admiralty Rules is Rule 32 authorizing the taking of depositions and [fol. 88] the rule under which respondent, Judge Miner, entered the order granting complainants leave to take the discovery deposition of petitioner. Rule 32 provides as follows:

"Rule 32. Depositions: Taking and Use of. The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute and except that their use shall be limited as hereinafter set forth.

"Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a witness, whether or not a party, may be used by any party for any purpose, if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is bound on a voyage to sea, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the depositions; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.

"(3) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

"Substitution of parties does not affect the right to use depositions previously taken; and when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

"The rule may be superseded by an agreement of the parties approved by the Court."

[fol. 89] Thus, the District Court under proper authority promulgated its Local Admiralty Rules, including therein a rule permitting the taking of depositions. Under this Admiralty Rule 32 the respondent Judge Julius H. Miner entered the deposition order. It is this order which petitioner contends was "in excess of power" of the Court sitting in Admiralty.

Significantly, many other District Courts in the country have likewise enacted local rules providing for the taking of discovery depositions. For example, the New York District Court deposition rule in Admiralty is almost identical with the Northern Illinois District Rule. (See Benedict on Admiralty, Vol. V).

C. District Court Admiralty Rule 32 Being a Valid and Legal Exercise of the District Court's Rule Making Power in Admiralty Under Supreme Court Rule 44, Any Orders Entered Thereunder are Both a Necessary and Proper Exercise of Admiralty Judicial Power and Are Neither Contrary to nor in Violation of any Admiralty Supreme Court Rule or Any U. S. Statute.

1. District Court Admiralty Rule 32 is not Violative of or "In Excess Of Power" of any Supreme Court Rule, But is a Proper Exercise of Rule Making Authority Under Supreme Court Rule 44.

The Supreme Court Admiralty Rules do not expressly provide for the taking of oral discovery depositions. This is a procedure which has been left to the local districts to adopt by local rule. Rule 44 establishes such authority in providing that, "In suits in admiralty *and all cases not provided for by these rules or by statute,* the District Courts are to regulate their practice * * * ."

[fol. 90] Because the Supreme Court incorporated into its Admiralty Rules similar discovery provisions to those found in the Federal Rules of Civil Procedure,[1] but did not adopt, in Admiralty, Rule 26 of the Federal Rules of Civil Procedure providing for discovery by deposition, petitioner draws an inference therefrom that oral discovery depositions may not be taken in admiralty, especially, urges the petitioner, in view of Rule 81(a) of the F.R.C.P. which provides that these rules "do not apply in admiralty" (Pet. Mem., p. 5). Petitioner's position poses two questions. *First*, from the silence of the Supreme Court in refraining from enacting a specific admiralty rule covering oral discovery depositions, can an inference be made or a conclusion drawn that the Supreme Court intended, by such silence, to prohibit discovery depositions from being taken

[1] Thus, the Supreme Court adopted Admiralty Rule 31 (written interrogatories), 32 (Discovery and Production of Documents), 32A (Physical and Mental Examination), 32B (Admission of Facts and Documents) which are similar to Rules 33, 34, 35 and 36 of the Federal Rules of Civil Procedure (See Benedict, Admiralty, Vol. V, pp. 10-12).

in admiralty or to withhold thereby authority to local district courts to enact rules for such discovery procedure; and *secondly*, what is the true meaning and intent of the Supreme Court in enacting F.R.C.P. 81(a) providing that the Federal Rules shall not apply in admiralty? The first question is answered hereunder; the second is answered under Point C, 3 *infra* of this memorandum.

[fol. 91] Perhaps the most scholarly opinion ever written on the question of discovery powers of an Admiralty Court is found in *Dowling* v. *Isthmian S.S. Corporation*, 184 F. 2d 758 (C.A. 3, 1950). The opinion of the Court indicates a most thorough research and careful study into source material, historical background, and admiralty practice on the subject of discovery depositions. Respondents most sincerely urge the Court to study this opinion. The material is presented not in an argumentative manner, but as a scholarly and intellectual treatise on the entire subject matter of discovery in admiralty.

In answering the first question—as to any inference or conclusion to be reached from the Supreme Court's refraining to enact an oral discovery deposition rule—the Court in the *Dowling* case was presented with this precise question. The opinion sets forth two answers to the inquiry, the first being that oral depositions can be prohibited only by an express statutory provision or Supreme Court Rule to this effect; and secondly, in the absence of such an express prohibition, no adverse inference can be drawn from the Supreme Court's silence, but rather the inference is that the Supreme Court was desirous of allowing the District Courts to exercise their historical and flexible practices of obtaining discovery. In expressing this opinion, the Court stated at page 772:

> "* * * The Courts of instance jurisdiction could be deprived of authority to require a party to answer orally according to the accustomed modes of procedure only by express prohibition, established by acts of Congress or Rule of the Supreme Court."

[fol. 92] As to the second reason for concluding the Supreme Court's silence was not prohibitive, the Court stated at page 764:

"• • • For a hundred years then, the Supreme Court has had express authority to prescribe and regulate the forms and modes of taking and obtaining discovery. The fact that this power has not been exercised does not indicate that there were no methods of obtaining discovery by the procedure of civil law. It merely indicates that the Supreme Court was satisfied with the existing flexible practice which then obtained."

and at page 773 stated:

"It is urged that the Supreme Court of the United States has evinced an intention to withhold from District Courts the power to require parties to undergo examination by oral deposition. But the inference is only that the Supreme Court has been satisfied with the exercise of traditional powers of the Admiralty Courts, and has not seen fit to interfere."

Thus, if any inference or conclusion is to be drawn from the fact that the Supreme Court did not enact in Admiralty a rule similar to Rule 26 of the F.R.C.P., the inference is that the subject matter of discovery depositions and authority to enact proper rules in reference thereto was to be left to the Local District Courts, which is precisely in accordance with the fact that the Northern District of Illinois has enacted such a discovery deposition rule.

On the contrary, if any inference can be drawn from the Admiralty Supreme Court Rules, it is clear under Supreme Court Rule 32C, the Supreme Court approved the propriety of taking discovery depositions in Admiralty.

Rule 32C of the Supreme Court Admiralty Rules, entitled "Refusal to Make Discovery—Consequences" provides in part that:

[fol. 93] "If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer."

The fact, that the Supreme Court recognized in Admiralty Rule 32C the propriety of discovery depositions, in conjunction with the traditional exercise by Admiralty Courts of discovery powers, makes clear that the Supreme Court, in its Admiralty Rules, was not attempting to limit the deposition powers of the Admiralty Courts. Manifestly, by the very nature of Rule 32C, the Supreme Court was indicating its approval of traditional discovery procedures historically available to Admiralty Courts, including the taking of discovery depositions.

Typical of the numerous Federal Court decisions adopting this view is *Brown* v. *Isthmian Steamship Corporation*, 79 F.Supp. 701 (E.D., Pa., 1948). In this case the question presented to the court was:

> "Has a party to a suit in Admiralty the right to take the testimony of the other party by deposition upon oral examination for the purpose of discovery?"

Mr. Justice Kilpatrick held that the provisions of Rule 32C would be meaningless if such a right were not conferred. He stated:

> "* * * it seems plain that the Supreme Court, when it promulgated the Admiralty Rules, must have considered that this mode of procedure was available to parties in admiralty and was in accordance with the usages of admiralty courts. Rule 32C of the Admiralty [fol. 94] Rules is entitled 'Refusal to Make Discovery—Consequences' and it provides 'If a party * * * refuses to answer any question propounded upon oral examination * * *' and then goes on to fix penalties for such refusal. *It is inconceivable that the Supreme Court, by means of the elaborate and detailed terms of Rule 32C would have given a suitor in admiralty a method of enforcing a right that did not exist.* It seems to me out of the question to impute a solecism of this kind to the Court and the distinguished group of admiralty lawyers who advised with the Court in drafting the Rules. That, however, would be the only alternative were I to hold that the procedure was not according to the usage of courts of admiralty."

Numerous other Federal Courts, considering essentially this same question, have also come to the conclusion that Admiralty Rule 32C, by clear implication, authorizes the taking of an oral deposition of an adverse party in an Admiralty proceeding. See *Ballantrae*, 1949 AMC 1999 (D.C., N.J., 1949); *Galterin* v. *U. S.*, 1949 AMC 1907 (E.D., N.Y., 1949); *Bunge Corp.* v. *Gounaris*, 1949 AMC 744 (S.D., N.Y., 1949).

At one time the District Court for the Southern District of New York adopted a contrary finding, to the effect that Admiralty Rule 32C was intended to have reference only to the kind of oral examinations permitted by the *de bene esse* statute. *Mulligan* v. *United States*, 87 F.Supp. 79 (S.D., N.Y., 1949). This case is quoted by petitioner in his supporting Memorandum (p. 11). What petitioner fails to note, however, is that this same district subsequently held that discovery depositions could be taken if sought under a Local Admiralty Rule permitting such depositions, rather than under Supreme Court Admiralty Rule 32C. *Ludena* v. [fol. 95] *The Santa Luisa*, 95 F.Supp. 790 (S.D., N.Y., 1951); *Republic of France* v. *Belships Company, Ltd.*, 91 F.Supp. 912 (S.D., N.Y., 1950), mandamus denied 184 F.2d 119 (C.A. 2, 1950).

2. Any Order for Oral Discovery Deposition Entered Pursuant to District Court Admiralty Rule 32 Is Not Violative of or in Derogation of Any Act of Congress Particularly the Statute Allowing *de bene esse* Depositions in Admiralty (R.S. 863).

Notwithstanding the above-cited Congressional authority and Supreme Court Admiralty Rule 44 delegating rule-making power to the District Court, petitioner makes the bold assertion that "depositions 'for discovery only' are beyond the power of the statutory district courts" (Pet. Mem., p. 7). Such assertion seemingly is based upon two most untenable assumptions: first, that the *de bene esse* statute is "the governing source of deposition power in the statutory courts of the United States—in admiralty" (Pet. Mem., p. 6). Necessarily this contention means that the *de bene esse*

statute is not only all inclusive of the type of depositions which may be taken in admiralty, but, moreover, is an exclusive determination of what depositions may not be taken in Admiralty; secondly, the distorted assumption that Federal Rule of Civil Procedure No. 81(a) providing that such rules "shall not apply to admiralty" is a substantive prohibition against Admiralty Courts promulgating their own discovery rules. (This latter provision is considered under Point 3 following.)

As to the proposition that the *de bene esse* statute is the sole source of deposition procedure in Admiralty there are [fol. 96] numerous reasons why such a contention is wholly without merit. First, the *de bene esse* statute itself (App., p. 42) does not provide that it shall exclusively govern the type of depositions permissible in Admiralty. On the contrary, the obvious and plain intent of the statute is to provide a means (and incidentally preserve the historic practice in Admiralty when witnesses were at sea, etc.) for taking the type of depositions identified as being *"de bene esse,"* that is, to take oral testimony prior to trial under the conditions enumerated in the statute, which testimony might or might not be used at trial.

De bene esse depositions are not and never have been, historically or currently the *only* type of depositions in Admiralty. To contend so is absurd. The most cursory review of the authorities will convince the Court that many types of depositions, including discovery depositions, have been, for centuries, used in Admiralty practices and, moreover, that *de bene esse* depositions were not exclusive. In the *Dowling* case, 184 F.2d 758 (C.A. 3, 1950), the Court answered this exact point by stating that there are and were at least six different appropriate methods of taking depositions in Admiralty, to-wit:

> "Congress extended the ancient practice of depositions de bene esse under the familiar conditions to all the courts of the United States, and by the same statute, lest confusion should arise, expressly preserved the power of appropriate courts to order testimony taken [1] in memoriam rei perpetuandum and [2] under dedimus potestatem, and to issue [3] letters rogatory. The statute permitting taking of depositions [4] de

bene esse was not a limitation upon the power of the federal courts to have testimony taken in other ways. Thereafter testimony was taken of parties and wit- [fol. 97] nesses on interrogatories [5] before commissioner and otherwise, and [6] by deposition viva voce under varying conditions. The methods were never mutually exclusive, but, by the express terms of the law, existed side by side. The statute requiring proof to be taken by word of mouth was long ago repealed, but this mode of procedures has remained constant in the federal courts, both on trial and on either deposition or commission. Now, within recent months, the enactment confirming the use of dedimus potestatem and letters rogatory has been repealed. But that establishes no barrier to the customary practices of the Admiralty Court. The courts of instance jurisdiction could be deprived of authority to require a party to answer orally according to the accustomed modes of procedure only by express prohibition, established by acts of Congress or Rule of the Supreme Court." (Brackets and numbers added)

Thus, it is obvious that to contend that the *de bene esse* statute is the sole source of deposition power is not only a strained interpretation of the *de bene esse* statute itself, but is without any supporting authority. Petitioner relies largely upon the Supreme Court case of *Ex Parte Fisk*, 113 U.S. 713, 5 S.Ct. 724 (1885) which supports the proposition that discovery depositions cannot be taken under a local New York statute under which an order of court was entered because such statute was in conflict with the Federal *de bene esse* statute when applied to a common law action. This case is rather tenuous authority to support the legal proposition contended by petitioner in the instant case. First, *Ex Parte Fisk* did not involve the right to take depositions in Admiralty. In fact, the Court expressly stated that the matter presented was "one of common law." at page 727 the Court stated:

"The matter in question here occurred in the court below in regard to a common law action. It was in regard to a method of procuring and using evidence, *and*

it was a proceeding in a civil cause other than equity or admiralty." (Italics added)

[fol. 98] Moreover, the case involved a transfer of the case below from the New York court to the Federal Court wherein the Federal Judge below entered an order, not under the *de bene esse* statute, but pursuant to the New York statute. *Ex Parte Fisk* simply holds that depositions in a civil case under a New York statute cannot be taken if the *de bene esse* statute, when applied to a common law civil action, provides otherwise. It was a case of which of two statutes was to prevail in a civil suit. Since *Ex Parte Fisk* was decided 74 years ago (1885), the Supreme Court has re-enacted its Admiralty Rules and enacted its Federal Rules of Civil Procedure, which has obviously created wholly different questions than those presented in the cited case.

Petitioner appears to take an inconsistent position regarding District Court Admiralty Rule 32. Without an identification of the rule, petitioner contends at page 9 of his Memorandum that the Local District Court Admiralty Rule contains a provision reading "except as otherwise provided by statute," and thereafter interprets this exception as being the *de bene esse* deposition statute. Seemingly, petitioner then relies upon the exception to the rule and presents a most confused argument that because the *de bene esse* deposition statute applies "in Admiralty only" [having been repealed by Congress in its application to common law or civil causes], that, therefore, Local District Court Admiralty Rule No. 32 has some validity or "some valid function" (Pet. Mem., p. 10). Thereafter, petitioner asserts Admiralty Rule 32 to be "void" because the *de bene esse* "statute prohibits" and the F.R.C.P. Rule 81(a) is a "man-[fol. 99] date" excluding discovery depositions from Admiralty practice. This inconsistency in the interpretation of District Court Admiralty Rule 32 is even more glaring in view of the failure of petitioner to explain any reasonable basis for the District Court promulgating its Admiralty rule.

District Court Admiralty Rule 32 is consequently not violative of or in derogation of any act of Congress or

Supreme Court rule. The *de bene esse* statute and Admiralty Rule 32 are wholly consistent with one another in that each covers its own specific type of deposition and procedure, and to contend otherwise would vitiate Rule 32.

A most important decision on the question presented is one decided in the United States District Court for the Southern District of New York, *Ludena* v. *The Santa Luisa*, 95 F.Supp. 790 (S.D., N.Y., 1951). This case arose after this same court had decided the *Mulligan* case, upon which petitioner relies (Pet. Mem. 11). Moreover, it was also decided after the Court of Appeals for the Second Circuit had rendered its decision in the *Mercado* case.

In the *Ludena* decision, which was a proceeding in Admiralty, the libelant had refused to appear for examination pursuant to notice, and the claimant moved for an order, pursuant to Local Admiralty Rule 46 of that Admiralty District and Supreme Court Admiralty Rule 32C for an order directing the libelant to appear for examination. Distinguishing the situation in the *Mulligan* case—which [fol. 100] had been relied upon almost exclusively by the Court of Appeals for the Second Circuit in rendering its decision in the *Mercado* case, the District Court held that its Local Admiralty Rule permitting the taking of discovery depositions was valid and thus granted claimant's motion for an order directing the libelant to appear for examination. Because this case does unalterably refute the contention of petitioner that the *de bene esse* statute constitutes a rigid limitation on Admiralty Courts with respect to the taking of depositions, particularly in the presence of a Local Admiralty Rule so permitting, the reasoning of this Court is here set forth in full:

> "Under the decisions of this court in Mulligan v. United States and The Edmund Fanning, the motion would fail if sought only under Rule 32C.
>
> "Libellant argues that Local Admiralty Rule 46 does not by its terms authorize such an order. In this she is clearly wrong. She further urges that if the rule be interpreted to authorize pretrial oral examination it is invalid. The only decision on the rule which is cited, or of which I am aware, is to the contrary. The Court of Appeals in refusing to issue mandamus or prohibi-

tion to Judge Holtzoff, did not pass on the validity of the rule. Nor did it do so in Mercado v. United States, decided shortly before. The latter decision, so far as here material, held only that it was error to receive a deposition in evidence, in the absence of compliance with the requirements of the de bene esse statutes.

"Libellant presses on the court that Local Admiralty Rule 46 is a violent departure from established admiralty practice. 3 Benedict on Admiralty 34 (6th ed. 1940) said 'An admiralty deposition * * * may not be taken for the purpose of discovery' and cites Mathews v. United States and The Morro Castle. But Judge Byers in the first case did not, it seems to me, pass on that point at all. Rather the decision went on want of a showing of good cause for an order requiring production of demanded documents. In The Morro Castle [fol. 101] Judge Patterson, it is true, indicated some doubt whether, 'general oral examination before trial of an adversary's officers and agents is permissible at all in admiralty cases * * *.' But he decided no more than that it was not, before issue was joined.

"The Court of Appeals for the Third Circuit has lately considered this question. The opinion by District Judge Fee, who sat as a member of the court, after extensively reviewing the history of Admiralty practice, states in 184 F.2d at p. 784: 'The conclusions which are to be drawn from this resume of the practices of the Admiralty Courts is that discovery from a party before trial was always a permissible practice, but that there was a shift of emphasis wherein the personal response of the party to the positions of the libel or answer fell into disuse and the practice of searching the conscience by written interrogatories had vogue for a time. But there was always opportunity at the court's discretion to take testimony by word of mouth.'

"These views seem irreconcilable with Judge Rifkind's views on Admiralty's historical powers which were accepted by the Court of Appeals in Mercado v. United States. Reconciliation of these views is not necessary here. Neither is a choice between them, even

if this court were free to make it. In the Mercado case, the Court of Appeals noted Local Admiralty Rule 46 which had been but recently adopted. While it did not pass on its validity, neither did the court criticize or cast doubt on its validity. Accordingly, I hold the rule valid. Of course, I do not decide more than is before me, namely, the authority to order the libellant to appear for examination. Questions as to the use of the deposition at the trial have not been considered and are not passed upon.

"The motion is granted."

In the instant case we are concerned only with the determination of the lower Admiralty Court as to the propriety of taking discovery depositions in an Admiralty proceeding. We do not reach the question of the admissibility in evidence at trial of any part of a deposition so taken and, indeed, the *Mercado* decision itself dealt only with the single question of the admissibility of a discovery deposition into evidence.

[fol. 102] The *Ludena* decision, particularly because it was decided by the same Court as the *Mulligan* decision upon which petitioner relies, as did the Court of Appeals for the Second Circuit, in conjunction with Judge Fee's decision in the *Dowling* case, constitutes the most cogently reasoned statement of the law on this subject of the right of an Admiralty Court to order the taking of discovery depositions, particularly under a Local Admiralty Rule which permits discovery.

Petitioner further asserts the proposition that, the *de bene esse* statute must be construed as meaning that an Admiralty Court not only lacks power "with respect to the *use* of depositions not provided for by that Act, but as to their *taking*"—the subject covered by Section 1 of the Statute. In support of this proposition petitioner cites *Ex Parte Fisk*, commented upon, and Supreme Court's Admiralty Rule 46 which provides:

"In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of the parties."

That this contention is wholly without merit was decided by the United States District Court for the Southern District of New York in *Republic of France* v. *Belships Company, Ltd.*, 91 F. Supp. 912 (S.D., N.Y., 1950), *mandamus denied* 184 F. 2d 119 (C.A. 2, 1950):

> "The general rule, however, regulates only the manner in which the trial shall be conducted. It does not bear on matters preliminary to the trial. Under modern practice, depositions may be taken for purposes of discovery as well as for use at the trial. *It necessarily follows, therefore, that by local rule, the* [fol. 103] *District Court may permit the taking of depositions, since their use for discovery do not contravene the general rule.* The person taking the depositions is not required to specify the manner in which they are to be used."

In the instant case, as in the *Republic of France* decision, the question presented is whether District Courts in Admiralty proceedings may, by local rule, provide for the taking of discovery depositions of parties and witnesses. The question of the admissibility of such depositions at the trial as original evidence or otherwise is not an issue presented in this case.

The *Mulligan* case, relied on so strongly by petitioner, is not applicable, even in a jurisdiction where the Federal Courts have adopted restrictive interpretations of the Admiralty Rules and the *de bene esse* statutes, in the presence of a Local Admiralty Rule which authorizes and permits the taking of discovery depositions. Such is the clear holding of the *Ludena* and *Belships* decisions.

3. District Court Rule 32 and Any Order Entered Thereunder is Not Violative of, Repugnant to, or "In Excess of Power" of Rule 81(a) of the Federal Rules of Civil Procedure which Provides that the F.R.C.P. Shall not Apply to Proceedings in Admiralty.

Petitioner omits in his sworn petition filed in this Court the Admiralty Rule under which the claimants below moved

for and secured the discovery deposition order entered by respondent. Petitioner's verified petition (par. 4) alleges that claimants filed motions for depositions "under Rules 25, 28 and 30 of the Federal Rules of Civil Procedure." [fol. 104] This is only a half truth. The motion was expressly based upon "Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil Procedure."

Petitioner's failure to include the all-important District Court Admiralty Rule 32 in a petition of this type seems unexplainable, especially when considered with the nature of the erroneous assertions made in petitioner's Memorandum regarding the application of Rule 81(a) of the F.R.C.P. and the erroneous conclusion alleged that the respondent Judge Julius H. Miner entered the order below under the Federal Rules of Civil Procedure rather than the true fact that such order was entered under and by authority of Admiralty Rule 32.

Petitioner seemingly relies upon a misinterpretation of respondent Judge Miner's statement that "I am going to apply them," made from the bench on the day the order was entered (Pet. Mem., pp. 1, 5) in order to attempt to buttress his claim that the Court ordered the depositions under the F.R.C.P. rather than Admiralty Rule 32, so that he could more vigorously contend such an order was violative of Rule 81(a). In other words, petitioner undoubtedly seeks to predicate his case of "arbitrary excess of power" by Judge Miner on some non-existent abuse of the F.R.C.P. rather than upon a judicial determination of the meaning and application of Admiralty Rule 32. It is true, but irrelevant, that respondent replied, "I am going to apply them" following Mr. Hayes' argument in Court that Rule 26(b) of the F.R.C.P. did not apply in Admiralty, but the basic reason and authority for such a statement is found in Admiralty Rule 32 which specifically [fol. 105] establishes the procedural means or guide for providing that the taking of discovery depositions "shall be governed by the Federal Rules of Civil Procedure." Obviously, any technical interpretation of respondent's statement in Court is immaterial, especially in view of claimant's original motion filed in an Admiralty action asking that discovery depositions be taken under Admir-

alty Rule 32, with the designation of which federal rules were to be used as a guide. Substantively, the F.R.C.P. were not followed or applied in any Admiralty proceeding because Rule 81(a) so provides.

It is obvious from petitioner's Memorandum, however, that he contends that respondent wrongfully and in excess of power entered the deposition order in Admiralty under the F.R.C.P. which is expressly prohibited by Rule 81(a) (Pet. Mem., p. 2). Moreover, petitioner reasserts in eleven places in his Memorandum that Rule 81(a) is an express prohibition against permitting discovery depositions in Admiralty.

Noticeably also, is petitioner's lack of comment on or analysis of District Court Admiralty Rule 32, its origin, meaning or intent. It is inconsistently criticized as having "some valid function" under undefined circumstances and "void" under others.

Petitioner's entire petition and argument is premised upon Rule 81(a) of the F.R.C.P. to the effect that the Federal Rules of Civil Procedure "do not apply to proceedings in admiralty." Respondent's order pertaining to discovery deposition is not inconsistent with this rule. [fol. 106] In effect, petitioner's argument means that a civil practice rule enacted primarily to preserve admiralty practice, as such, is actually prohibitive to the adoption or enactment of Admiralty Rules, the very essence of that which was sought to be protected by Rule 81(a). Of course, Rule 81(a) prohibits the civil rules from being applicable in Admiralty, but Rule 81(a) neither expressly or by inference prohibits admiralty from adopting Admiralty Rules not in conflict with the Federal Statutes or Supreme Court rule. On the contrary, Supreme Court Admiralty Rule 44 expressly provides that Admiralty Courts may regulate in "all cases not provided for by these rules or by statute" and practice in such a manner as they deem most expedient for the administration of justice.

In construing a similar statute, the District Courts have consistently held that there is nothing in Rule 81(a) to prevent a District Court in Admiralty from either entering orders in accord with its Admiralty Rules or to prohibit a District Court in Admiralty from using such rules as a

guide to the promulgation of its Admiralty Rules. In *Darling's Estate* v. *Atlantic Contracting Corp.*, 150 F. Supp. 578 (E.D., Va., 1957), a Local Admiralty Rule similar to Rule 32 of the Illinois District was questioned, particularly that portion referring to the Federal Rules of Civil Procedure. The Court said:

> "The intent of this Rule is simply to aid procedure. Molinos v. The Rio Grande, D.C., 129 F. Supp. 25. It is not *per se* binding upon the district court to apply the Federal Rules of Civil Procedure, 28 U.S.C.A., [fol. 107] but the intent of these rules may well be considered. There is nothing in *Dowling*, supra, which precludes the adoption of a local rule effectively incorporating the Federal Rules of Civil Procedure into admiralty practice and procedure, when not in conflict with the Supreme Court Rules or a statute and when consistent with equitable principles. Under 28 U.S.C.A. § 2073, the Supreme Court is authorized by Congress to prescribe, by general rules, the forms, practice, and procedure in admiralty and maritime cases in the District Courts, but this statute was not intended to prevent the adoption of local rules not in conflict therewith. *Nor does the provision of Rule 81(a)(1) of the Federal Rules of Civil Procedure prevent a district court from using the civil procedure rules as a guide in the exercise of its sound discretion when deemed most expedient for the due administration of justice.*" (Italics added)

The Federal Rules of Civil Procedure are likewise withheld from being applicable to other types of proceedings besides Admiralty. Rule 81 contains many exceptions, such as bankruptcy, copyright, adoption, lunacy, certain appeals, etc.

II. As a Matter of Law, the Petition for Writ of Mandamus or Prohibition Should Be Denied.

An affirmance by the Court of respondent's legal position presented in Point I necessarily disposes of all issues presented. However, in view of the filing of the petition

for a Writ of Mandamus and the supporting Memorandum (pp. 2-5) dealing with the purported "excess of power" alleged to have been exercised by respondent, Judge Julius H. Miner, respondent submits to the Court as part of his legal memorandum his legal authorities in answer to the erroneous contentions and legal propositions urged by petitioner.

Mandamus and prohibition are drastic and extraordinary remedies, and should be reserved only for the most extraor- [fol. 108] dinary causes. As the Supreme Court stated in *Ex Parte Fahey*, 67 S.Ct. 1558 (1947):

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes."

See also *Bankers Life & Casualty Company* v. *Holland*, 74 S.Ct. 145 (1953); *United States Alkali Export Association* v. *United States*, 65 S.Ct. 1120 (1945); *Alcoa Steamship Company* v. *Ryan*, 211 F.2d 576 (C.A. 2, 1954); *Gulf Research & Development Company* v. *Leahy*, 193 F.2d 302 (C.A. 3, 1951).

These self-searching cautionary judicial remarks are constantly before the Federal Courts whenever they have had occasion to consider whether or not they should exercise the extraordinary powers of mandamus or prohibition.

Petitioner cites and relies upon a number of court decisions in which mandamus was issued. A study of such cases reveals, however, that they are not in point as a matter of law or fact. Petitioner's argument (Pet. Mem., pp. 1-3) seemingly urges that respondent exercised an "arbitrary excess of power" by defying Rule 81(a) which is a "mandate" that the F.R.C.P. do not apply to proceed-

ings in Admiralty. According to petitioner, respondent Judge Miner committed such excess of power when he said, [fol. 109] "I am going to apply them." Although such is an erroneous interpretation of respondent's statement and is arbitrarily asserted to support the conclusion of an "excess of power" being exercised in violation of Rule 81(a) (See Point I, C 3, supra, p. 24), assuming *arguendo*, it would most assuredly seem not only judicious, but essential to the merits of petitioner's claim that he, at least, make some reference to or call to the Court's attention the existence of District Court Admiralty Rule 32 before asserting to the Court that respondent engaged in such "arbitrary excess of power" that this Court should exercise its prerogatives to issue the extraordinary writ of mandamus. It seems unique that petitioner, in devoting five pages of his Memorandum (pp. 1-5) to "authorities" purporting to support the issuance of a writ, makes no reference to the fact that respondent issued the discovery deposition order pursuant to Rule 32 of the District Court Admiralty Rules. Surely, it cannot be disputed that this is a most pertinent and material aspect of the case.

Three of the cases cited by petitioner, namely, *LaBuy* v. *Howes Leather Co.*, 77 S.Ct. 309 (1957); *McCullough* v. *Cosgrove*, 60 S.Ct. 703 (1940); *Los Angeles Brush Mfg. Co.* v. *James*, 47 S.Ct. 286 (1927) deal with the discretionary power of a District Court to refer cases to a Master of Chancery, in purported violation of Rule 53(b) of the Federal Rules of Civil Procedure, or the Old Equity Rules. None of the cases were Admiralty decisions or dealt with the power of an Admiralty Court, pursuant to a Local Admiralty Rule, to take discovery depositions. *U. S.* v. *Kirkpatrick*, 186 F.2d 393 (C.A. 3, 1931) is in Admiralty, [fol. 110] but deals solely with the question of whether an Admiralty Court may refer a case to a Commissioner to hear testimony and submit an advisory opinion to the Court, in view of Admiralty Rule 43-1/2. *Riche* v. *Evaporated Milk Association*, 63 S.Ct. 938 (1943) dealt with the question of the alleged error of a District Court in striking certain pleas in abatement to a criminal indictment.

We are not here concerned with any of the questions presented in the foregoing cases. We are only concerned

with the question of whether an "extraordinary cause" exists warranting the issuance of mandamus or prohibition where an Admiralty Court, pursuant to a Local Admiralty Rule adopted under authority of Supreme Court Admiralty Rule 44, enters an order granting a party litigant leave to take a discovery deposition.

This was the identical and precise question presented to the Court of Appeals for the Second Circuit in *Belships Company, Ltd.* v. *The Republic of France*, 184 F.2d 119 (C.A. 2, 1950) where the Court denied a petition and refused to issue a Writ of Prohibition or mandamus, prohibiting the District Judge of the United States District Court for the Southern District of New York from taking any steps to enforce the taking of the depositions of two witnesses pursuant to notice served, under a Local Admiralty Rule for the taking of depositions in Admiralty cases.

The Court said at page 119:

> "While we have authority to issue one of the extraordinary writs here prayed for in aid of our appellate jurisdiction, we have been admonished that this [fol. 111] should be done only when necessary in extraordinary cases, and not as a means of interlocutory appeal. Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041; Bank Line v. United States, 2 Cir., 163 F.2d 133. We fail to see how the taking of depositions of witnesses who have their own remedy if they are improperly subpoenaed and whose testimony has not yet been and may never be offered in evidence at the trial satisfies these standards. Accordingly, we dismiss the petition.
>
> "Petition dismissed."

(See also opinion of the District Court in *Republic of France* v. *Belships*, 91 F.Supp. 913.)

Thus, there is clear authority to deny the petition for a writ of mandamus. Petitioner cites no applicable authority in support of the issuance of a writ in a case involving an interlocutory order in Admiralty permitting the taking of discovery depositions or that the entry of

such an order is an "arbitrary excess of power." Neither the *Mercado* or *Mulligan* cases cited by petitioner were mandamus proceedings.

The *Belships* decisions appear to be the only decisions in the Federal Court which determine the precise question presented to this Court. Moreover, it is perhaps proper, although argumentative by analogy only, to refer the Court to its decision in *O'Malley* v. *Chrysler Corp.*, 160 F.2d 35 (C.A. 7, 1947). While not involving a mandamus proceeding, this Court premised its decision upon reasons which were not unlike those pronounced in the *Belships* cases.

Conclusion

Respondents, the Hon. Julius H. Miner and Hon. Edwin A. Robson, respectfully request that for the foregoing reasons set forth in Points I and II, the petition for writ of mandamus or prohibition be dismissed as a matter of law.

Respectfully submitted,

Hon. Julius H. Miner, Hon. Edwin A. Robson, Respondents, by Robert W. Macdonald, Seyfarth, Shaw, Fairweather & Geraldson.

[for 113]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Title omitted]

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE AND BRIEF—Filed February 2, 1959

The response to this Court's rule to show cause has certain striking characteristics.

One Respondent denies that he "would apply" the Federal Rules of Civil Procedure in Admiralty. (Response, p. 3) He does not deny he did apply them. He met Petitioner's objection that the F.R.C.P. do not apply in Admiralty by saying: "I am going to apply them." (Appendix, p. 26) The argument now made that a local district court rule,

made by district judges, directed him to apply them in admiralty (his counsel's argument omits "except as otherwise provided by statute") is only a new admission that he did apply them in admiralty.

The admission, intrinsic in the argument now advanced by Respondents, that one district judge alone perhaps could not lawfully do that, is made (according to the supporting brief, page 27 thereof) because F.R.C.P. 81 (a) prohibits doing it. The admitted prohibition of Rule 81 (a) is not addressed to doing it by one judge, but to doing it. [fol. 114] Nor is Rule 81 (a) the whole story. When the applicable law requires testimony to be taken in open court "except as otherwise provided by statute" (and Admiralty Rule 46 still so requires—in Admiralty) the Supreme Court has held that the *de bene esse* statute, which formerly applied alike in law, equity and admiralty "prohibits" a court of the United States from subjecting a party to such an examination as is here sought. The *de bene esse* statute was preserved by the Supreme Court and Congress for Admiralty alone. The cases cited on pages 7, 8 and 9 of our Brief are directly apposite. When the Supreme Court continued *Admiralty* Rule 46 unchanged, providing as it does that testimony shall be taken in open court "except as otherwise provided by statute," the statute so referred to was obviously the *de bene esse* statute, which the Supreme Court and Congress preserved for *Admiralty* alone; it is the statute which "otherwise provides." The authorities cited in our Brief at pages 7, 8 and 9, are ignored by the District Court judges on whose views Respondents rely.

The purpose of these provisions of statutes—and of rules having the force and effect of statutes—to leave Admiralty deposition practice under the well-understood *de bene esse* statute which, in conjunction with Congress, is preserved for Admiralty alone, and exclude the deposition-discovery innovated for law and equity by F.R.C.P. 26 (a) from admiralty procedures is unanswerably manifest. The Supreme Court in subsequently amending the *Admiralty* rules to include *in haec verba* nearly all the other provisions of the F.R.C.P. for discovery still excluded the depositions-discovery provisions of F.R.C.P. 26 (a) from the admiralty practice, leaving those provisions in the F.R.C.P., and there

alone, where they are subject to the continuing mandate that *these* rules do *not* apply to proceedings in admiralty. [fol. 115] Respondents' counsel (Brief, p. 18) isolates a sentence from the *Fisk* case (giving the wrong page) which sentence says it was not a case in equity or admiralty. Turning to the page on which that was said (113 U.S. at 720) one finds that it was said *to admit* the applicability of the conformity act, there just above quoted (whose express language this sentence follows) *despite* which the examination sought was held to be prohibited—even at common law, to which the conformity act admittedly applies. It was also necessary there that the requirement that all testimony be taken in open court "except as otherwise provided by statute" should be found in some provision applicable at common law. It was found, in a statute now superseded by the F.R.C.P. for common law, but the same provision is made and continued for admiralty by the Supreme Court's Admiralty Rule 46.[1] Quoting that provision from the statute that then made that requirement at common law, and then quoting the *de bene esse* act, the Supreme Court held that such examination as is here sought was prohibited thereby (113 U.S. at 722, 725).

Relying on federal statutes that then continued all orders entered in state courts in force after removal to the federal courts (*Ex Parte Fisk*, 113 U.S. 713 at 717); and on the federal statute then allowing in federal courts depositions taken pursuant to state law, the argument of counsel in *Fisk* was that a state court order, entered before removal, for a discovery deposition, was "not in conflict" with requirements of federal law that (1) testimony shall be taken in open court and (2) the *de bene esse* act. That argument—[fol. 116] which the court rejected—was, precisely:

"* * * The examination of a party under the Code of New York, either for the purpose of enabling a party to

[1] "In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of the parties." Admiralty Rule 46.

"The mode of proof in the trial of action at common law, shall be by oral testimony and the examination of witnesses in open court, except as hereinafter provided for." [The court then quotes the *de bene esse* act.] *Ex Parte Fisk*, 113 U.S. 713, 722.

frame a complaint, *Kenney* v. *Stedwell*, 64 N.Y. 120, or for the prosecution or defence of the action, *Fogg* v. *Fisk*, 93 N.Y. 562, is a substitute for the old Chancery bill of discovery. The evidence so taken may or may not be used on the trial. The practice is in no wise in conflict with the statutes of the United States. The object of § 861 Rev. Stat. is to provide a mode of proof on the trial of an action; but it does not refer to this proceeding, in the nature of discovery, conducted in accordance with the practice prevailing in New York. See Mr. Justice Miller's Opinion in *Flint* v. *Crawford County*, 5 Dillon, 481. The act of March 3, 1875, § 4, provides that all orders made in the suit prior to removal shall stand. The order to take the petitioner's testimony was made before removal. This order is by the act made to stand, and even if the evidence cannot be used on the trial of this action, as a deposition, it can be used in other suits; and even in this it can be used as a declaration of the party. * * * "

(Argument rejected by *Ex Parte Fisk*, 113 U.S. at 717)

But the Supreme Court, quoting the requirement that witnesses shall be examined in open court except as otherwise provided by statute—which provision is made and continued in Admiralty by Admiralty Rule 46—and quoting the *de bene esse* act, which still applies in Admiralty, held that the examination sought was inconsistent with, and therefore prohibited by, these provisions. It was exactly this inconsistency—of a rule for discovery examination with these provisions of federal law (which are continued in Admiralty by Rule 46 and the *de bene esse* act)—that prohibited the discovery examination sought. *Ex Parte Fisk*, 113 U.S. 713 and *Hanks Dental Association* v. *Tooth Crown Company*, 194 U.S. 303, 307.

Whatever the source of a rule for deposition-discovery examination—whether a state, or the F.R.C.P. (which "do not apply to proceedings in Admiralty"), or the local rule of some district court—it is here held by the Supreme Court to be inconsistent with these provisions of federal law, which remain fully applicable in Admiralty.

[fol. 117] Admiralty Rule 44 allowing district courts to make local admiralty rules expressly forbids local rules inconsistent with the Supreme Court's Admiralty Rules; and obviously district courts cannot make local rules that are inconsistent with statutes. (Indeed, this local rule explicitly disavows such effect, saying "except as otherwise provided by statute.") The provisions (with which the practice of deposition-discovery was above held inconsistent by the Supreme Court) viz., for taking testimony in open court and the *de bene esse* statute, are made by *Admiralty* Rule 46, and by the *statute* which the Supreme Court continued for Admiralty also. Obviously, when the *Fisk* and *Hanks* cases hold a rule for deposition-discovery inconsistent with a provision for taking testimony in open court and the *de bene esse* act, they negate any power of a local district court to adopt such a local rule. District courts have no power to adopt local rules inconsistent with Supreme Court rules and statutes.

To this is now super-added the facts that the Supreme Court in adopting a discovery deposition rule for law and equity, has said that it "does *not* apply to proceedings in admiralty"—and *excluded* that rule when it overhauled the admiralty discovery procedure. This continued, for admiralty, the pre-existing practice, by which power to take discovery depositions was not only *"not conferred,"* but *"prohibited."* (Auth. cit.)

As to the fact that, when the Supreme Court amended the Admiralty discovery rules by including most of the F.R.C.P. discovery provisions it excluded F.R.C.P. 26, we do not find that Respondents' counsel attempts any reasoning on this clinching aspect of the matter. The only decision he finds reaching a result he likes which expressly (albeit obliquely) touches it, is in the district judge's opinion in *Brown* v. *Isthmian S.S. Corp.*, quoted by him at Brief 15, which travels on a manifestly false dilemma (that counsel underscores). True, as the judge there says, amended Admiralty Rule 32 (c) provides for answers on some kind [fol. 118] of oral examination; but it is simply not true to conclude, as he there does, that this has to be the kind of oral examination allowed by F.R.C.P. 26 (a)—which "does not apply" in Admiralty. That is not "the only alternative,"

contrary to what the judge says. Oral examination in Admiralty is under the *de bene esse* statutes; that is the "other alternative" ignored by the judge in the *Brown* case. The *Mulligan* case spells this out; it was approved by the Court of Appeals, all as quoted in our brief, pages 10 and 11, and in *Gulf Oil Corporation* v. *Alcoa S.S. Co., Inc. & U.S.A.*, 1949 American Maritime Cases, 1965, the *Brown* case is distinguished both because 28 U.S.C.A. 723, to which it refers, has been replaced by 28 U.S.C. 2072 and 2073 and also on the grounds above stated, viz., that there is no dilemma that "would justify the invention of a rule by the court."

The statements on the subject in the *Dowling* case put forward by Respondents' counsel are admittedly pure dictum, discovery not even being there involved.

> "The question of whether discovery can be obtained from a party, although debated, is really not raised, since a libelant refused to testify at all. The question of whether witnesses can be examined by deposition is not strictly relevant, since examination of a party is sought. The question of whether the testimony of a party by oral deposition, rather than by written interrogatories, can be taken alone is involved. Finally, what may be done under the Admiralty Rules does not necessarily come before us, since here the party was directed to answer by order of court."
>
> *Dowling* v. *Isthmian S.S. Corp.*, 184 F. (2) 758, on 762.

The author of this dictum says in this dictum that deposition-discovery was old Ecclesiastical Court practice and thus old admiralty practice—but anyone willing to examine the citations in his extremely voluminous footnotes will discover that his great diligence does not find *even one admiralty* case allowing oral deposition-discovery, as distinguished from proof—whether in England or America. As [fol. 119] pointed out in *Mulligan* and approved by the Court of Appeals in *Mercado*, his idea that this was ever *admiralty* is an "historical error."

His "history" is no better when he gets to the Federal statutes. He says that the "musty statutes" of 1789 and 1792 (1 Stat. 93, 94 and 1 Stat. 276) authorized American admiralty courts to use the practice of Ecclesiastical Courts which had a practice derived from the civil law (*Ibid*, 764), but even those "musty statutes" required testimony in admiralty to be taken in open court, except as otherwise provided by the statute, as Judge Fee admits (p. 769) and as is shown by 1 Stat. 88 which requires proof in admiralty to be by oral testimony and examination of witnesses as at common law. He elsewhere recognizes that this 1789 statute excludes deposition-discovery as practiced in ancient Ecclesiastical Courts in England, from American admiralty practice (*Ibid*, 772) but emphasizes that this provision was repealed in 1842—and that the power to make admiralty rules controlling the admiralty practice was by that same act given to the Supreme Court (*Ibid*, 772) 5 Stat. 518.[1] He admits that although for a period which he mistakenly puts at "one hundred years" the Supreme Court did not make a rule, there was no "use" of deposition-discovery in admiralty, although the statute of 1789 requiring testimony to be in open court in admiralty had been repealed and the rule-making power given to the Supreme Court as above (*Ibid*, 772), but when the Supreme Court did make a rule, it was to reiterate the requirement of the statute of 1789—which, he admits, inhibited the discovery-deposition in admiralty, viz., the requirement that testimony in admiralty shall be taken *in open court* "except as otherwise provided by statute." That is Admiralty Rule 46 above quoted which now remains the rule of the Supreme Court *in admiralty*. [fol. 120] In short, the true history is that deposition-discovery in admiralty in this country was inhibited by a statute enacted in 1789 (1 Stat. 88, *supra*), and never there-

[1] The statute he cites as "repealing" the 1789 Act does *not* repeal it, but merely gives the Supreme Court power to make rules on the subject (*Ibid*, 772, n. 39, 5 Stat. 518) When the Supreme Court made a rule it reiterated for *admiralty* the requirement of R.S. 861 (28 U.S.C. 635 prerevision, derived from the 1789 Act, quoted in *Fisk*) by adopting Admiralty Rule 46, above quoted.

after used, although that statute was repealed in 1842[1] (5 Stat. 518) when the Supreme Court was given power to make rules (5 Stat. 518) and the requirement of the 1789 statute was re-established by the Supreme Court's Admiralty Rule 46—that requirement being that testimony in admiralty shall be taken in open court "except as otherwise provided by statute."

Finally, the "musty statutes" of 1789 (1 Stat. 93, 94) and of 1792 (1 Stat. 276) which were the source of 28 U.S.C.A. 723 prerevision (as the historical note thereto shows) were in 1948 overhauled to eliminate entirely any reference whatever to the civil law and replaced by another statute in three sections, 28 U.S.C. 2071, 2072 and 2073—which replaced 28 U.S.C.A. 723 prerevision, and plainly show that admiralty practice is now determined by rules and not by explorations of ancient Ecclesiastical law as supposed in the *Brown* case and the *Dowling* dictum. This was clearly held in *Gulf Oil Corporation* v. *Alcoa S. S. Co.*, 1949 A.M.C. 1965 where the court denied depositions by the officers of the corporate respondent, its servants and employees, in an admiralty case, saying:

> "In *Brown* v. *Isthmian S. S. Corporation*, 1948 A.M.C. 1998, 79 F. Supp. 701, where the Court required the oral deposition of a party in admiralty ca[illegible] it looked to [former] 28 U. S. Code, Sec. 723 then [illegible]aw. Sections 2072 and 2073 of the Judicial Code [illegible]ceed only sec. 723 of Title 28 and they reflect adherence to the rules. The reference in [General Admiralty] Rule 32 (c) to the failure to answer questions propounded upon oral examination can be read with sec. 32 (a) which may be taken as a complete explanation of the language of 32(c). The relief granted by Rule 32 conceivably might require some oral examination. Such an opinion removes any necessity for the inference that 32 (c) implies any right to oral examination and only a necessary inference would justify the invention of a rule by the court." (Op. Cit. p. 1966)

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[1] Judge Fee says, Dowling p. 772 N. 39, but the statute he refers to did not repeal it. 5 Stat. 518.

[fol. 121] In short, the remarkable conclusion of the *Dowling* dictum that testimony in admiralty is to be taken in open court, except as otherwise provided *by the judge* (as he may happen to "feel" about it, *Dowling*, 773)—instead of "except as otherwise provided *by statute*" as Supreme Court Admiralty Rule 46 has long required and still requires—is a legal curiosity unsupported by any citation. As pointed out in *Mulligan* and *Mercado*, it is an historical error (*Mulligan* v. *U. S.*, 87 F. Supp. 79, 80-81; *Mercado* v. *U. S.*, 184 F. (2d) 24, 28-29) to imagine that deposition-discovery was a part of admiralty practice when the Supreme Court in 1934 adopted F.R.C.P. 26 or when in amending the admiralty discovery rules in 1939 it again excluded deposition-discovery from admiralty practice by omitting F.R.C.P. 26 from the admiralty rules and leaving it in the F.R.C.P. themselves subject to the affirmative proviso "these rules do not apply to proceedings in admiralty" (F.R.C.P. 81 (a)).

The "personal answer" of a *party in admiralty*, mentioned in the *Dowling* dictum (as reading of its citations of decided cases will show) was the answer in writing to the written libel, as supplemented by amendment and written interrogatories. It was sworn to, and thus supplied proof on issues tendered. This was, and remains, the admiralty practice. (Admiralty Rule 26) Obviously it is not formal pleading by general traverse, special traverse, confession and avoidance on the *absque hoc*, etc., as at common law. (Cf. Chitty, Pleadings.) Just as obviously, it is not "discovery" (as the *Dowling* dictum calls it) nor was it oral, and no ancient or modern case is cited in Dowling's notes that holds otherwise.

The old Ecclesiastical practice did allow an oral answer and a lot of other things, that no decided *admiralty* case ever accepted. If that ancient practice, rather than the Rules of the Supreme Court and the Federal statutes, remained the measure of *admiralty* powers, we should find ourselves in some strange places. Discussing "The proce-[fol. 122] dure of the Ecclesiastical Court [which] is called the Civil Law System" a better historian than Judge Fee records:

"But this is not all; for the witnesses would be examined in secret, i. e., no one could be present but the witness under examination, the judge and the notary, the latter reducing the answers of the witness to writing." (Langdell, *Summary of Equity Pleadings*, Sec. 3, p. iii 1877)[1]

Respondents' counsel quotes the *Dowling* dictum at pages 12 and 13 to the following effects: First, that "the courts of instance jurisdiction [meaning, we suppose, U. S. district courts, which have none but statutory powers] could be deprived of authority to require *a party* (*sic*) to answer orally [an authority no statute gives the U. S. courts in admiralty, whether answering the libel, amendments, or interrogatories] according to the accustomed modes of procedure [oral answers to oral interrogatories for purposes of discovery and not in answer to issues of the libel are not found in any admiralty decision cited by Judge Fee] only by express prohibition, established by acts of Congress of Rule of the Supreme Court." That is Judge Fee's unsupported dictum, as he returns from wandering back through the centuries in the Ecclesiastical moon-shine! No court we know of has ever embraced those extraordinary ideas, before or since; they are rejected by the Second Circuit Court of Appeals in *Mercado*.

[fol. 123] Next, Respondents' counsel quotes this dictum to the effect that the Supreme Court has had express authority for a hundred years, to prescribe forms and modes of taking discovery—and has not exercised it because it "was satisfied with the existing flexible practice that then obtained." Assume the Supreme Court has had such powers; the district courts do not. The "flexible practice that then obtained" did not include (in England or here) depo-

[1] "Plaintiff is, in all civil causes entitled to what are called 'Personal Answers' of the defendant on oath with this exception, that the defendant is not bound to answer any criminal matter * * * this stage of the cause corresponds with the plea at common law, i. e. it is an answer of fact to all and every the positions or articles of the libel (which, we have seen, resembles the declaration).

"The witnesses are examined secretly, and their depositions taken down by an examiner. * * *"

(Burns, *Ecclesiastical Law*, Vol. III, p. 189)

sition-discovery (distinct from depositions to prove the issues), and Judge Fee cites no case for his idea that any such practice obtained "in admiralty" for a hundred years or for five minutes. He puts forward an unsupported historical error, and *Mulligan* and *Mercado* call it what it is.

Respondents' third quotation is to the same unsupported and historically erroneous effect.

Counsel for Respondents remarks (Brief p. 20) that the *Mulligan* case was not followed by a later decision of another judge in that district in the *Ludena* case, and perhaps it was not his duty to add that other judges in that district *do* follow it (e.g., *Kelleher* v. *U. S.*, 88 F. Supp. 139). It seems to us that the statutes and the Supreme Court's rules, having the force and effect of statutes, are the law—and that divergencies of some judges who demonstrably fail to face the situation established by the statutes and Supreme Court rules, or even misstate it, are not.

It seems oddly significant that counsel relies on a conflict among district judges in the Second Circuit when the Court of Appeals for that circuit expressly approved the *Mulligan* case in *Mercado* (our Brief, pages 10 and 11). Some of the district judges there, as in *Ludena* and other district court cases put forward by Respondents, simply refused to follow their Court of Appeals, having observed that while it had not retreated from its views of the law as announced in *Mercado* in accordance with *Mulligan*—it had [fol. 124] declined to require its district judges to respect its stated views by prohibition, saying that witnesses can appeal from any order that would punish them for not testifying. See *Republic of France* v. *Belships Co.*, 184 F. 2d 119 (CA 2, 1950). The right of a witness to appeal from a contempt order is not going to maintain the orderliness and legality of the judicial process at *nisi prius*, and nothing could more forcibly demonstrate that than the conflict and confusion of district court rulings in the Second Circuit to which counsel refers. This unseemly chaos in district court decisions in the Second Circuit obviously will continue until that Court of Appeals accepts its responsibility to enforce what, in *Mercado*, it admits to be the law, *by prohibition*. Statutory district courts of the United States have only statutory powers, and a function of the

writ of prohibition is to maintain the orderliness of the judicial process, and especially when they exceed those powers. (See our Brief, pages 2-5 and auth. cit.)

If it is inconsistent with these statutes, and these Rules having the force and effect of statutes, for one district judge to say that F.R.C.P. 26 applies in admiralty, it is equally inconsistent if several district judges by a local rule should undertake to say so. It is still inconsistent.

We pointed out in our brief that in a case rejecting a local district court rule as a basis of depositions in a Federal Court which were not authorized by statute, that the taking of depositions not authorized by statute or Supreme Court rule (having the force and effect of a statute) was held to be a deprivation of common right. *Randall* v. *Venable*, 17 Fed. 162 (CC. W.D. Tex. 1883). In rejecting a discovery not provided for by applicable statute the Supreme Court holds, citing the Fisk case:

> [fol. 125] "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference or others, unless by clear and unquestionable authority of law. As well said by *Judge* Cooley: 'The right to one's person may be said to be a right of complete immunity: to be let alone.' Cooley on Torts, 29."
>
> *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250, 252 (1890)

Respondents' counsel (see his brief, p. 30, for instance) directs personal criticism at counsel for Petitioner, saying in effect that we did not sufficiently call the Court's attention to what they now call *District Court* Admiralty Rule 32. Anyone who has read our brief will recall that it received rather more attention than it deserved. None of the three several motions for these depositions, two signed by counsel who represents the Respondents here, invoked *District* Court Admiralty Rule 32, but Admiralty Rule 32 (Appendix, pp. 6, 9, 11) on which the *Mulligan*, *Mercado* and *Alcoa* cases comment. (*Vide supra*) Counsel for Respondents has "hung his hat" here on a local District Court

rule that he never invoked in his several motions! Perhaps, when he prepared his motions, he agreed with us, that *District* Court Admiralty Rule 32 cannot support the order he asked for, as pointed out in our brief, pages 9 and 10, and relied on judicial momentum generated by habitual application of the F.R.C.P. to get the District Court to apply them in Admiralty. Although it was pointed out below, that the F.R.C.P. do not apply in Admiralty, the District Judge ruled: "I am going to apply them." (Appendix, p. 26)

Respondents' remaining point denies that this is such a case as to warrant this Court in issuing its writ of prohibition or mandamus. We have covered that in our brief, [fol. 126] pages 2 to 5, and the citations there are apposite to the propositions to which they are cited. The statements of Respondents' counsel respecting the cases we cite are not always precise and are never complete and accurate. More significantly, his attempted "distinctions" are of the familiar sort that would so particularize and amputate every case cited against him that their rationale is hidden.

His brief has given us opportunity to add that the unseemly conflict and confusion of decision in the district courts of the Second Circuit, between districts there, and even between individual judges in the same district, is the inevitable consequence of the withholding of the Court of Appeals of that Circuit of enforcement by prohibition or mandamus of its views of what the law is, as stated by it in *Mercado*, approving *Mulligan*.

In conclusion: what the district judge did was inconsistent with the Supreme Court's Rules and the statutes, which maintain a distinct system of procedure in Admiralty, in this and other respects. For that reason it was both wrong, and beyond his power. It is argued that not just the one judge, but several district judges by a local rule, have undertaken this practice. It is still inconsistent with the Supreme Court's Rules and the statutes. District judges who have only statutory powers cannot make rules inconsistent with the Supreme Court's rules and the statutes. The Supreme Court has held that pretrial deposition-discovery is inconsistent with the requirements which it has continued in Admiralty—the requirement that testimony

be taken in open court except as otherwise provided by statute, and the *de bene esse* act.

Respectfully submitted,

Edward B. Hayes, Lord, Bissell & Brook, Warren C. Ingersoll, Proctors for Petitioner.

[fol. 127]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12516

September Term, 1958—January Session, 1959

Original Petition for Writ of Mandamus or Prohibition

H. LESLIE ATLASS, Petitioner,

v.

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois, Respondents.

Before Duffy, Chief Judge, Hastings and Parkinson, Circuit Judges.

OPINION—March 31, 1959

Hastings, Circuit Judge. We have before us the petition of H. Leslie Atlass for the issuance of a writ of mandamus or prohibition to be directed to the Honorable Julius H. Miner and the Honorable Edwin A. Robson and any other Judge of the United States District Court for the Northern District of Illinois, prohibiting the enforcement of an order entered by Judge Miner directing petitioner and others to submit to oral discovery deposition in an admiralty proceeding now pending in the district court.

The proceeding below is entitled, "In the Matter of the Petition of H. Leslie Atlass for exoneration from or limi-[fol. 128] tation of liability as owner of a certain vessel

known as Yacht Sis", in the United States District Court for the Northern District of Illinois and there numbered 57 C 722. This proceeding was first assigned to Judge Miner who, after hearing oral argument on the motion of certain claimants and petitioner's objections thereto, on November 24, 1958, entered an order granting the movants leave to take the depositions of petitioner and others named therein. The cause was subsequently reassigned to Judge Robson before whom it is now pending. The order of November 24, 1958 is under attack in the present petition. In answer to a rule to show cause the respondents have filed their response and memorandum.

At the outset it can be said that we agree with respondents that mandamus and prohibition are extraordinary remedies and should be reserved only for the most extraordinary causes. This court has been slow to resort to these remedies in the exercise of its supervisory powers over the district courts and we have been unwilling to allow their use as a substitute for appeal. *Ex Parte Fahey*, 332 U.S. 258, 259-260 (1947). However, believing as we do that the critical issue raised at this juncture strikes at a fundamental procedural question, to await its determination until the hearing of an appeal on the merits of the case would afford a clearly inadequate remedy. Further, the resolution of this question will affect procedure in all admiralty proceedings in the Northern District of Illinois and may serve to avoid a conflict in the district courts of this circuit. Since we are here concerned with the rulemaking power of the district courts, our present consideration may likewise serve to crystallize this problem and afford a clear opportunity for its further review if such is found to be necessary. Accordingly, we shall determine this petition on its merits. See *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 31 (1943); *McCulloch* v. *Cosgrave, Judge*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Co.* v. *James*, 272 U.S. 701, 705 (1927).

The motions of the claimants below on which the order of November 24, 1958 was based recited in part:

"FOR AN ORDER, *pursuant to Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil*

Procedure, granting the claimant and complainant [fol. 129] leave to take the oral depositions of H. Leslie Atlass, * * *, material witnesses herein, *for the purposes of discovery only*, * * *." (Our emphasis.)

Respondents contend that the words "Admiralty Rule 32" in the foregoing motion refer to District Court Admiralty Rule 32, rather than Supreme Court Admiralty Rule 32 as petitioner urges, and we shall accept this interpretation in our subsequent consideration of this matter.

The District Court for the Northern District of Illinois has adopted thirty-three Admiralty Rules covering various phases of admiralty practice. Among these is Rule 32 which provides:

> "The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute and except that their use shall be limited as hereinafter set forth. * * *." (Here follow the provisions relating to the use of depositions.)

The ultimate question before us for determination relates to the validity of this rule. Does the district court have the power through adoption of this rule to require a party in an admiralty proceeding to submit to oral discovery deposition?

Rule-making power generally is vested in all federal courts by Congress pursuant to 28 U.S.C.A. § 2071. Congress has given authority to the Supreme Court of the United States to make admiralty rules for the district courts in 28 U.S.C.A. § 2073, which provides in part as follows:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States."

Certainly one of the purposes the Congress must have intended was to achieve uniformity in admiralty practice and procedure:

> [fol. 130] "The admiralty and maritime jurisdiction being, by the Constitution, entirely transferred from the States to the general government and made a purely Federal jurisdiction, of limited extent and peculiar character, it was from the outset deemed desirable that it should be uniform throughout the States, * * *." 2 Benedict, Admiralty 2 (6th Ed. 1940).

Under authority of 28 U.S.C.A. § 2073, the Supreme Court has from time to time promulgated Rules of Practice in Admiralty and Maritime Cases, the present rules having been put into effect on March 7, 1921. See Title 28 U.S.C.A. It is undisputed that such rules have the force of statute.

The Supreme Court has authorized the district courts to make local admiralty rules pursuant to its Admiralty Rule 44, which provides:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, *provided the same are not inconsistent with these rules.*" (Our emphasis.)

Respondents here contend with much persuasiveness that their local District Court Admiralty Rule 32 was promulgated and fully authorized by Congress and the Supreme Court by virtue of 28 U.S.C.A. § 2071 and § 2073, and Supreme Court Admiralty Rule 44. It will be noted in this connection that local District Court Admiralty Rule 32 by its express terms adopts the Federal Rules of Civil Procedure.

In adopting the Federal Rules of Civil Procedure, 28 U.S.C.A., for the government of civil proceedings in the district courts, the Supreme Court prescribed the practice relating to depositions and discovery in Rules 26 to 37, inclusive. In Rule 81, the Supreme Court determined the

general applicability of all of the Federal Rules of Civil Procedure and expressly limited their application in admiralty proceedings in the following language.

"Rule 81. Applicability in General.

"(a) To What Proceedings Applicable.

"(1) *These rules do not apply to proceedings in admiralty.* * * *:" (Our emphasis.)

[fol. 131] It is conceded that the Supreme Court has not made any provision for the taking of oral discovery depositions in its Admiralty Rules. However, the Supreme Court has amended the present Admiralty Rules of 1921 on several occasions: In 1930, to direct that opinions upon trials of issues should find facts and state conclusions of law (Rule 46½); in 1932, to regulate the review by the court of a report by a commission (Rule 43½); and "most important of all, in 1939, to adopt seven of the Rules of Civil Procedure of 1938 relating to interrogatories, discovery, examination before trial, and scope of examinations and cross-examinations." 2 Benedict, Admiralty 2-3 (6th Ed. 1940). Thus, the Supreme Court, in their Admiralty Rule 31 (written interrogatories to parties), Rule 32 (discovery and production of documents), Rule 32A (physical and mental examination), Rule 32B (admission of facts and genuineness of documents) and Rule 32C (refusal to make discovery), adopted the identical text of Rules 33, 34, 35, 36 and 37, respectively, of the Federal Rules of Civil Procedure. *It did not amend its Admiralty Rules to adopt Rule 26, F.R.C.P., 28 U.S.C.A. to provide for discovery by deposition.* It is not for us to guess or speculate why this provision was omitted, but discovery by deposition is all the more conspicuous by its absence.

In passing, it may be observed that in 1939 the Supreme Court further amended its Admiralty Rules by adopting Rule 46A (scope of examination and cross examination) and Rule 46B (record of excluded evidence) by using the identical text of Rule 43(b) and (c), F.R.C.P., 28 U.S.C.A., respectively; and in 1942, by adopting Rule 44½ (pretrial procedure; formulating issues) which states: "Rule 16 of the Rules of Civil Procedure shall be applicable in

Admiralty." The obvious effect of these bodily adoptions of Specific Federal Rules of Civil Procedure is to give uniformity in these matters to practice and procedure in admiralty proceedings in all district courts.

The logical inference from this course of conduct on the part of the Supreme Court is that, if it had intended that discovery by deposition be permitted in district court admiralty procedure, it would have expressly authorized it when making its 1939 amendments. It is further significant that it did not leave the adoption of pre-trial procedure to local rule-making when it expressly made such a provision in 1942.

[fol. 132] In reaching this conclusion we find ourselves in disagreement with the Third Circuit where, in *Dowling* v. *Isthmian S.S. Corporation*, 3 Cir., 184 F. 2d 758 (1950), in an extended opinion by the learned Judge James Alger Fee (sitting as a district judge with the Third Circuit and now on the bench of the Court of Appeals for the Ninth Circuit), that court reached a contrary result. No local rule was involved in that case. The court upheld the right of the district court to order a *party* to submit to oral discovery based upon its determination that it was in accord with "common usage" in admiralty proceedings. The court indicated: "It is not intended by this discussion to say or even to intimate that such an order should be adopted in any particular case or that discovery should ever be allowed. *The matter should be left to the determination of the admiralty judge.*" (Our emphasis.) (*id.* at 787). In dicta, the court said that it felt the district court "could adopt a local regulation reinstating the old practice, since there has never been a specific Rule nor a statute upon the subject of examination of a party before trial." (Footnotes omitted.) (*id.* at 774-775) It is difficult for us to accept this reasoning persuasive as it is. If such a course were followed we would have an open invitation to a complete lack of uniformity in oral discovery by deposition in admiralty.

Judge Fee recognizes (at page 773) that "[t]here is a violent conflict among the ultra-modern opinions, written since the adoption of the recent statute and the amendments to the Admiralty Rules by the Supreme Court of

the United States." The cases Judge Fee thus refers to are those which hold that the absence of a Supreme Court rule on oral discovery in admiralty is a limiting factor prohibiting such discovery. (Cases cited in footnote 44 of Judge Fee's opinion.) The author states that "[t]hese decisions will not be considered. * * * [T]he conclusions of these opinions should have been formulated in terms of empiricism rather than in terms of power of the court." *Ibid.* The opinion further recognizes the proper though limited use of depositions *de bene esse* which are provided for in admiralty proceedings only.[1] However, that court [fol. 133] expressed the view that the *de bene esse* statute did not operate to the exclusion of other oral discovery by deposition.

Respondents argue that "if any inference can be drawn from the Admiralty Supreme Court Rules, it is clear under Supreme Court Rule 32C, the Supreme Court approved the propriety of taking discovery depositions in Admiralty." The following part of Rule 32C is cited as applicable:

> "If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer."

Respondents rely upon *Brown* v. *Isthmian Steamship Corporation*, D.C. E.D. Pa., 79 F. Supp. 701 (1948), in which the question presented was: "Has a party to a suit in admiralty the right to take the testimony of the other party by deposition upon oral examination for the purpose of discovery?" The court in that case noted the absence of a Supreme Court Admiralty Rule corresponding to

[1] The *de bene esse* act (R.S. 863-865) was formerly 28 U.S.C.A. §§639-641. It is now printed as a note preceding 28 U.S.C.A. §1781 with the notation: "Former sections 639-641 of Title 28 are applicable to admiralty proceedings only." See *Mercado* v. *United States*, 2 Cir., 184 F. 2d 24, 27 (1950).

Rule 26, F.R.C.P., but held that, although no instance of the use of this procedure in admiralty had been called to its attention, "it seems plain that the Supreme Court, when it promulgated the Admiralty Rules, must have considered that this mode of procedure was available to parties in admiralty and was in accordance with the usages of admiralty courts. * * * It is inconceivable that the Supreme Court, by means of the elaborate and detailed terms of Rule 32C would have given a suitor in admiralty a method of enforcing a right that did not exist." (*id.* at 701-702)

To the contrary, is another district court holding in *Mulligan* v. *United States*, D.C. S.D. N.Y., 87 F. Supp. 79, 80-81 (1949). In this opinion, Judge Rifkind had precisely the same question before him. Taking cognizance of the ruling in *Brown* and that it was predicated on Admiralty Rule 32C, although it was "acknowledged [by the author of the *Brown* opinion] that the practice was unknown to [fol. 134] him and that no instance of its use had been brought to his attention", and after noting the 1939 amendments to the admiralty rules by the Supreme Court (Rules 31, 32, 32A, 32B and 32C), the court goes on to say:

> "Significant is the omission from the Admiralty Rules of a provision corresponding to Civil Rule 26(a) which expressly establishes the practice of deposition upon oral examination for the purpose of discovery or for use as evidence. The omission of so important a provision could hardly be accidental.
>
> "Three possible explanations present themselves. One is that the right to oral examination for purposes of discovery was such an established part of admiralty practice that explicit provision for it was deemed unnecessary by the revisers of the Admiralty Rules. *Such an explanation does not accord with the facts of history.* 3 Benedict on Admiralty, 6th Ed., 1940, 34.
>
> "A second explanation is that oral examination for purposes of discovery was not used in admiralty and the revisers did not intend to introduce this feature of the new Civil Rules into admiralty procedure. Under this theory, the language in Rule 32C which refers to oral examination is an oversight on the

part of the draftsmen who, when incorporating Rule 37 of the Civil Rules, neglected to prune out the inapplicable language.

"A third explanation is that the revisers did not intend to authorize oral discovery proceedings and that the reference in Rule 32C to oral examinations relates to the kind of oral examination which is authorized in admiralty, namely, de bene esse depositions under 28 U.S.C.A. § 639 (pre-revision designation). This explanation, it is true, gives to the words of 32C a different content than the same words have in Civil Rule 37. But there is no reason why they should have the same. The advantage of this reading is that it overcomes the necessity of attributing to the revisers of the Admiralty Rules either a historical inaccuracy or the careless inclusion in 32C of the inapplicable language borrowed from Civil Rule 37." (Footnotes omitted.) (Our emphasis.)

The Second Circuit, in *Mercado* v. *United States*, 2 Cir., 184 F. 2d 24 (1950), in an opinion by Judge Clark, gave [fol. 135] approval to *Mulligan* in so far as it applied to the question in *Mercado*, which was whether an oral deposition not taken under the *de bene esse* statute was admissible in evidence, and adopted Judge Rifkind's reasoning. The court held that the reference to oral examination in Admiralty Rule 32C is only to that taken by virtue of the *de bene esse* statutes, which remain applicable in admiralty, and that depositions are not admissible in evidence except as provided in those statutes.

Judge Clark, now Chief Judge of that circuit, long active in the development of federal civil procedure, although of the view that the admiralty rules should encompass the broad discovery provisions of Rule 26, F.R.C.P., nevertheless adhered to the view that this should not be attempted through the judicial process. His views in this respect are well worth noting:

"*Nevertheless we are not directly a reform organization,* and under the usual ground rules for judicial action it is difficult to get away from Judge Rifkind's construction as a method of rationalizing the diverse

provisions before us. *We are the more constrained to this regrettable conclusion because a doubtful extension of the civil rules in admiralty may cause more confusion than a clean-cut decision demonstrating the need of revision.* To our minds this case shows the desirability of making the civil rules directly applicable in admiralty (with of course such additions on peculiar subjects, such as limitation of liability, as may be needed) without the confusion and question which may follow from a recopying of parts. At the very least the adoption of the subpoena rule, F.R.C.P. 45(e), if not of the deposition rule, F.R.C.P. 26, seems a necessity. Meanwhile we are constrained to hold that the reference to oral examination in Admiralty Rule 32C is only to that taken by virtue of the *de bene esse* statutes which remain applicable in admiralty, and that depositions are not admissible in evidence except as provided in those statutes. * * *." (Our emphasis.) (*id.* at 29)

The opinion further noted the adoption of a local admiralty rule in the Southern District of New York (as has been done in a few other districts), with this observation:

[fol. 136] "Thus, by chance rather than design, there has developed a quite troublesome, though rather unnecessary, question of practice, as the judges in the Southern District have recognized by attempting to correct it so far as they can by recent local rule.[2] We are tempted to cut the Gordian knot by forthrightly applying the modern federal practice as we have done in substance in other cases. * * *." (*id.* at 28-29)

[2] In footnote 2 to the text of his opinion, Judge Clark pointed out: "Local Admiralty Rule 46 of the United States District Court for the Southern District of New York, adopted May 10, 1950, provides that the taking and use of depositions shall be governed by the Federal Rules of Civil Procedure except that their use as evidence shall be under three stated conditions which, so far as the present situation is concerned, coincide with those of the *de bene esse* statute. The court properly hesitated to go further, since only the Supreme Court has the authority to supersede statutes. 28 U.S.C.A. § 2073 *supra*."

The court did not pass on the validity or invalidity of this local rule since the rule was not before it.

Two district judges sitting in the Southern District of New York have taken a position of supporting local Admiralty Rule 46 of that district. In *Republic of France* v. *Belships Co., Limited, Skibs A/S*, D.C. S.D. N.Y., 91 F. Supp. 912 (1950), Judge Holtzoff held that such local admiralty rule was valid, and that it was not inconsistent with Supreme Court Admiralty Rule 46[3] nor with the *de bene esse* statute. A writ of mandamus and prohibition was denied *per curiam* in that case by the Second Circuit, 184 F. 2d 119 (1950), the court holding that, although it had the authority to issue the writ in such a case, it did not elect to do so since the witnesses had their own remedy if they were improperly subpoenaed and because their testimony had not been and might never be offered in evidence at the trial.

In *Ludena* v. *The Santa Luisa et al.*, D.C. S.D. N.Y., 95 F. Supp. 790 (1951), Judge McGohey held the same local Admiralty Rule 46 to be valid. He relied upon Judge Fee's opinion in *Dowling* v. *Isthmian S.S. Corporation, supra*. In so doing he stated: "These views seem irreconcilable with Judge Rifkind's views on Admiralty's historical powers which were accepted by the Court of Appeals in *Mercado* v. *United States* [*supra*]. Reconciliation [fol. 137] of these views is not necessary here. Neither is a choice between them, even if this court were free to make it. In the *Mercado* case, the Court of Appeals noted Local Admiralty Rule 46 which had been but recently adopted. While it did not pass on its validity, neither did the court criticize or cast doubt on its validity. Accordingly, I hold the rule valid." (Footnotes omitted.) (*id.* at 791) The court did not pass upon the use of the deposition at the trial. There was no review of this holding by the Second Circuit.

It is not necessary here to dwell upon the broad question of the right to take depositions generally. Neither have we attempted the citation of the many authorities

[3] Supreme Court Admiralty Rule 46 provides in part: "In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties."

relating to the rule-making powers of the courts, nor other district court decisions more akin to the problem at hand. We have said enough to illustrate the conflicts and confusion which have arisen as to historical practices and procedures in admiralty and the attempts to fill in the gaps by judicial decree and local rules. Apparently, no Court of Appeals has determined this question in its relation to a local district court admiralty rule. This explains our feeling that we should do so, reluctant as we are to employ an extraordinary remedy for this purpose.

Fundamentally our determination of this issue must turn upon the nature of our approach to the solution of the problem. We could with good reason adopt a liberal attitude and say that oral discovery by deposition is recognized and properly used with good results in civil matters, and that it would serve litigants to the same advantage in admiralty. Or, we could say, with equal persuasion, that it is not for us to determine what is desirable in admiralty practice and procedure; and that, if discovery depositions are to be authorized, this can be brought about clearly and expeditiously by the simple method provided by statute.

"An admiralty deposition may only be taken for the purpose of securing evidence; it may not be taken for the purpose of discovery. For the present, the Federal Civil Rules in this respect are more liberal than the admiralty rules, which reverses the historic situation. It is to be hoped that Congress may by legislation permit the Supreme Court to promulgate the substance of Civil Rule [fol. 138] 26(a) as an admiralty rule." (Footnotes omitted.) 3 Benedict, Admiralty 34 (6th Ed. 1940).

However desirable we may think discovery by oral deposition in admiralty may be, we are firm in our conclusion that such a result should be reached through the legislative process rather than by judicial determination. The temptation to legislate by judicial pronouncement is ever present and some may argue is all too frequently employed. The plain and simple course here is by Supreme Court amendment with Congressional sanction. As long as it shall be the legislative policy that civil rules shall not apply in admiralty, except as they are made applicable

by the method indicated, we believe that to circumvent the legislative process through local rule-making power is, in this instance, unwise and may lead to confusion and lack of uniformity and is beyond the power of the local district court.

Summarizing our position, the Federal Rules of Civil Procedure generally do not apply in admiralty. The Supreme Court has the power to make admiralty rules for the district courts. The district courts are authorized to make local admiralty rules not inconsistent with the Supreme Court Admiralty Rules. The Supreme Court has not seen fit in its admiralty rules to authorize oral discovery by deposition. Although the Supreme Court has not by rule prohibited the taking of such discovery by deposition, yet it must have had this provision before it when making its 1939 amendments leading to the adoption of most of the other discovery practices in the Federal Rules of Civil Procedure. We are compelled to draw the inference that the local admiralty discovery rule is inconsistent with the Supreme Court Admiralty Rules. To quote again from Judge Clark: "We are the more constrained to this regrettable conclusion because a doubtful extension of the civil rules in admiralty may cause more confusion than a clean-cut decision demonstrating the need of revision." *Mercado* v. *United States*, *supra* at 29.

We hold that the local Admiralty Rule 32 of the District Court for the Northern District of Illinois is invalid. The writ of mandamus and prohibition prayed for by petitioners will issue, directing Judge Miner to vacate his order of November 24, 1958 which granted claimants leave to take the depositions of petitioner and others, and pro- [fol. 139] hibiting Judge Robson and any other Judge of the United States Court for the Northern District of Illinois to whom this cause may be assigned from enforcing the same.

[fol. 140]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12516

Before:

Hon. F. Ryan Duffy, Chief Judge; Hon. John S. Hastings, Circuit Judge; Hon. W. Lynn Parkinson, Circuit Judge.

Original Petition for Writ of Mandamus or Prohibition.

H. LESLIE ATLASS, Petitioner,

vs.

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois, Respondents.

This matter comes before the Court on the petition of H. Leslie Atlass for a writ of mandamus or prohibition, the response and memorandum of respondents thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

JUDGMENT—March 31, 1959

On consideration whereof, it is ordered and adjudged by this Court that a writ of mandamus and prohibition issue, directing Judge Miner to vacate his order of November 24, 1958 which granted claimants leave to take the depositions of petitioner and others, and prohibiting Judge Robson and any other Judge of the United States Court for the Northern District of Illinois to whom this cause may be assigned from enforcing the same, in accordance with the opinion of this Court filed this day.

[fol. 142] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 143]

SUPREME COURT OF THE UNITED STATES

No. 156—October Term, 1959

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, etc.,
Petitioners,

vs.

H. LESLIE ATLASS.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 156

HON. JULIUS H. MINER and HON. EDWIN A ROBSON, Judges of the United States District Court for the Northern District of Illinois,

Petitioners,

vs.

H. LESLIE ATLASS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Schaefer Press, Inc.—ANdover 3-6850

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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

HON. JULIUS H. MINER and HON. EDWIN A ROBSON, Judges of the United States District Court for the Northern District of Illinois,

Petitioners,

vs.

H. LESLIE ATLASS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Hon. Julius H. Miner and Hon. Edwin A. Robson, Judges of the United States District Court for the Northern District of Illinois, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that court in issuing a Writ of Mandamus and Writ of Prohibition against said petitioners and any other Judge of the United States Court for the Northern District of Illinois relative to a certain order issued by said Julius H. Miner, one of the petitioners herein, with reference to the taking of certain pre-trial depositions in an admiralty action.

A.

Reference to Reports of Opinions.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in full in Appendix 1a.

B.

Statement of Jurisdictional Grounds.

The judgment of the Court of Appeals for the Seventh Circuit was rendered on March 31, 1959.

Jurisdiction herein is invoked pursuant to Title 28 U.S.C.A. 1254(1).

> "IN REACHING THIS CONCLUSION WE FIND OURSELVES IN DISAGREEMENT WITH THE THIRD CIRCUIT WHERE, IN *DOWLING* v. *ISTHMIAN S.S. CORPORATION*, 3 CIR., 184 F.2d 758 (1950), IN AN EXTENDED OPINION BY THE LEARNED JUDGE JAMES ALGER FEE (SITTING AS A DISTRICT JUDGE WITH THE THIRD CIRCUIT AND NOW ON THE BENCH OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT), THAT COURT REACHED A CONTRARY RESULT."

Quoting from first sentence on page 6 of Seventh Circuit Court of Appeals opinion.

C.

Questions Presented for Review.

1. Do the various United States District Courts have the power to issue an order upon cause shown for the taking of oral pre-trial depositions in admiralty actions, whether the power be inherent, or from the federal statutes, Supreme Court Admiralty rules, or admiralty custom and usage?

2. Are United States District Court local admiralty rules which permit discovery practice and allow pre-trial oral discovery depositions invalid as being inconsistent with the existing United States statutes and United States Supreme Court admiralty rules?

D.

Statutory Provisions and Federal Rules Involved.

28 U.S.C.A. Sec. 2073 which provides:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the District Courts of the United States and all courts exercising admiralty jurisdiction in the territories and possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until after they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court."

b. *28 U.S.C.A., Sec. 2071.* The statute reads:

"The Supreme Court and all courts established by act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

c. *Rule 44 of the Supreme Court Admiralty Rules.*
Rule 44 reads as follows:

> "In suits in admiralty and all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

d. *Rule 32 C of the Supreme Court Admiralty Rules.*
Rule 32 C reads as follows:

> "Rule 32C. Refusal to make discovery—consequences
>
> "(a) Refusal to answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under any provision of law, or upon the refusal of a party to answer any interrogatory submitted under Rule 31, the proponent of the interrogatory may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

"(b) Failure to comply with order (Pertinent section)

"(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court."

e. *Rule 81 (a). Rules of Civil Procedure for the United States District Courts.* Rule 81 (a) reads as follows: (pertinent section)

"Rule 81. Applicability in General.

"(a) To What Proceedings Applicable.

"1. These rules do not apply to proceedings in admiralty."

f. *Rule 32 of the local admiralty rules of the District Court for the Northern District of Illinois.* Rule 32 reads as follows:

"32. Depositions: Taking and Use of. The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute and except that their use shall be limited as hereinafter set forth.

"Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a witness, whether or not a party, may be used by any party for any purpose,

if the court finds: 1, That the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is bound on a voyage to the sea, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the depositions; or 3, that the witness is unable to attend or testify because of age, sickness, informity or imprisonment.

"(3) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of which is relevant to the part introduced, and any party may introduce any other parts.

"Substitution of parties does not affect the right to use depositions previously taken; and when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

"The rule may be superseded by an agreement of the parties approved by the Court."

E.

Statement of the Case.

On October 26, 1956 two seamen returning from shore leave, Kurt Darr, age 47, and Clem Muth, age 41, were drowned in the Detroit Harbor Basin while crew members of the Yacht "SIS" due to the alleged failure to have a means of ingress and egress to said vessel and the failure to have adequate rescue and resuscitation appliances. On April 23, 1957, H. Leslie Atlass as owner and operator of the vessel filed an admiralty action for exoneration from or limitation of liability. The personal represen-

tatives of the Estates of Kurt Darr and Clem Muth duly filed their respective claims and answers to said action.

A motion was made by the claimants with cause shown to take the oral pre-trial discovery depositions of the petitioner and others. The Hon. Judge Julius H. Miner, Judge of the United States District Court (to whom this case was assigned), issued an order for the taking of said depositions. After the order for the taking of the depositions was signed, the cause was transferred to the Hon. Edwin A. Robson, H. Leslie Atlass filed for a Writ of Mandamus or Prohibition against the aforementioned judges in the United States Court of Appeals for the Seventh Circuit. On March 31, 1959, the aforementioned court of appeals ordered the issuance of said writ against both petitioners herein, and all other judges of the United States Court for the Northern District of Illinois.

F.

The Raising of the Federal Questions.

This petition is to review an order issued by the United States Court of Appeals for the Seventh Circuit.

G.

Proceedings in Federal Courts.

Covered in the statement of the case.

H.

Reasons for Granting Writ of Certiorari.

The decision of the Court of Appeals below greatly affects all admiralty practice in every district court in the country.

The judgment below destroys the right to discovery, pre-trial examination and proper preparation for trial

which has inherently become a part of modern litigation. Any deprivation of a suitor's right to pre-trial oral discovery in admiralty cases surely presents a question of serious public interest, especially in view of the rights of freedom of discovery enjoyed by other litigants in civil cases under the Federal Rules of Civil Procedure. Public policy and interest demand the continuance of its rightful use in admiralty.

The decision which is the subject of this Petition for a Writ of Certiorari involves the following conflicts, interpretations and ruling:

1. It admittedly conflicts with decisions of other courts of appeals on the same legal matter.

Dowling v. *Isthmian S.S. Corporation*, 184 F. 2d 758. (C.A. 3, 1950)

Republic of France v. *Belships Company, Ltd.*, 91 F. Supp. 912, mandamus denied 184 F. 2d 119, (C.A. 2d, 1950)

2. It is in conflict with decisions of other district courts in other circuits, and the accepted and usual course of judicial proceedings.

Brown v. *Isthmian S.S. Corporation*, 79 F. Supp. 701 (E.D. Pa., 1948)

Ballantrae, AMC 1999 (D.C., N.J. 1949)

Galterin v. *U.S.*, 1949 AMC 1907 (E.D.N.Y., 1949)

Bunge Corp. v. *Gounaris*, 1949 AMC 744 (S.D. N.Y. 1949)

Ludena v. *The Santa Luisa*, 95 F. Supp. 790 (S.D. N.Y. 1951)

3. It creates non-uniformity in its interpretation of the following federal statutes and United States Supreme Court Admiralty Rules.

28 U.S.C.A. 2073
28 U.S.C.A. 2071
Supreme Court Admiralty Rule 44
Supreme Court Admiralty Rule 32 C

4. It holds a Northern District of Illinois Admiralty rule invalid.

Rule 32, Northern District of Illinois Admiralty Rules.

5. It creates non-uniformity in its interpretation of a United States District Court Rule of Civil Procedure.

Rule 81 (a)

6. It requires a specific enunciation of a solution for this problem based upon this court's supervisory powers.

Strangely, in all these years the Supreme Court of the United States has never been called upon to decide the question of whether or not an admiralty court had the right to order a pre-trial oral deposition under any condition whether it be the Supreme Court Admiralty Rules, United States statutes, admiralty customs and usages, inherent equity powers, rules of civil procedure for the United States District Courts, or local admiralty rules adopted by the various district courts of the United States.

The conflict that has arisen between the courts of appeal as a result of this decision of the Court of Appeals for the Seventh Circuit in case no. 12516 arises from the different decisions of different circuits in interpreting the question.

"Whether or not a federal district court, sitting in admiralty, has the right upon application of a suitor, and the showing of good cause by same, to grant an order for the taking of pre-trial oral depositions?"

One might assume that after the learned opinion in the case of *Dowling* v. *Isthmian S.S. Corporation,* 184 F. 2d 758, (C.A. 3, 1950) pre-trial oral depositions were permissible in admiralty and this practice thereafter became the standard method of procedure of all lawyers representing libelants as well as respondents. They have utilized the pre-trial oral deposition as a common practice and ultimately saved the trial court considerable time during the trial. They brought about the elimination of the element of surprise in an action, and permitted the lawyers to reach the heart of the problem of each case, whether it be factual or legal. (See Appendix 2a)

Since the decision in the *H. Leslie Atlass* v. *Hon. Julius H. Miner and Hon. Edwin A. Robson* case, no. 12516, by the Court of Appeals for the Seventh Circuit we are now faced with two contrary decisions from two different circuit courts of appeal. Lawyers throughout the country will now be placed in a quandary as to which decision the local admiralty court will follow. Uniformity is no longer possible. Local admiralty courts may change from their former practice and refuse to permit pre-trial oral depositions. The goal of modernization of the federal courts may suffer a severe setback if the decision from the Seventh Circuit is permitted to stand. Litigants may also suffer in not having the right to take the pre-trial deposition which has been proven such a valuable asset to all lawyers practicing before the civil and admiralty courts.

The fact that the United States Supreme Court has never passed upon the question involved in this petition

for a Writ of Certiorari has confused numerous judges sitting both in the district courts and the circuit courts of appeal. Examples of statements by the various judges are as follows:

Brown v. *Isthmian Steamship Corporation*, U.S.D.C., Eastern District, Pennsylvania, July 26, 1958, Judge Kirkpatrick, District Judge of the Third Circuit, 79 F. Supp. 701-2,

> "The libelant argues that pre-trial discovery by oral examination of a party has never been a mode of proceeding according to the usages of the Courts in Admiralty. So far as I know, it has not been used in this Court, and no instance of its use has been called to my attention. However, it seems plain that the Supreme Court, when it promulgated the Admiralty Rules, must have considered that this mode of procedure was available to parties in admiralty and was in accordance with the usages of Admiralty Courts. Rule 32 C of the Admiralty Rules is entitled 'Refusal to Make Discovery—Consequences', and it provides, 'If a party * * * refuses to answer any question propounded upon oral examination * * *' and then goes on to fix penalties for such refusal. It is inconceivable that the Supreme Court, by means of the elaborate and detailed terms of Rule 32 C would have given a suitor in admiralty a method of enforcing a right that did not exist. It seems to me out of the question to impute a solecism of this kind to the Court and the distinguished group of admiralty lawyers who advised with the Court in drafting the Rules. That, however, would be the only alternative were I to hold that the procedure was not according to the usage of Courts of Admiralty."

Mulligan v. *U. S. et al.*, U.S.D.C., Southern District, New York, October 24, 1949, District Judge Rifkind, 87 F. Supp. 79 at 80-81,

"Significant is the omission from the Admiralty Rules of a provision corresponding to Civil Rule 26 (a), which expressly establishes the practice of deposition upon oral examination for the purpose of discovery or for use in evidence. The omission of so important a provision could hardly be accidental.

"Three possible explanations present themselves. One is that the right to oral examination for purposes of discovery was such an established part of admiralty practice that explicit provision for it was deemed unnecessary by the revisers of the Admiralty Rules. Such an explanation does not accord with the facts of history. Benedict on Admiralty, 6th Edition, 1940, 34.

"A second explanation is that oral examination for purposes of discovery was not used in admiralty, and the revisers did not intend to introduce this feature of the new Civil Rules into admiralty procdeure. Under this theory, the language and Rule 32 C, which refers to oral examination, is an oversight on the part of the draftsmen who, when incorporating Rule 37 of the Civil Rules, neglected to prune out the inapplicable language.

"A third explanation is that the revisers did not intend to authorize oral discovery proceedings and that the reference in Rule 32 C to oral examinations relates to the kind of oral examination which is authorized in admiralty; namely, *de bene esse* depositions under 28 U.S.C.A. 639 (pre revision designation). This explanation, it is true, gives to the codes of 32 C a different content than the same words have in Civil Rule 37. But there is no reason why they should have the same. The advantage of his reading is that it overcomes the necessity of attributing to the revisers of the Admiralty Rules either a historical inaccuracy or the careless inclusion in 32 C of the inapplicable language borrowed from Civil Rule 37."

Mercado v. *U.S.*, U.S. Court of Appeals, Second Circuit, 184 F. 2d 24 at pages 28 and 29, Circuit Judge Clark,

> "Thus, by chance rather than design, there has developed a quite troublesome, though rather unnecessary, question of practice, as the Judges in the Southern District have recognized by attempting to correct it so far as they can by recent local rule. We are tempted to cut the Gordian knot by forthrightly applying the modern federal practice as we have done in substance in other cases.
>
> "Nevertheless we are not directly a reform organization; and under the usual ground rules for judicial action it is difficult to get away from Judge Rifkind's construction as a method of rationalizing the diverse provisions before us. We are the more constrained to this regrettable conclusion because a doubtful extension of the civil rules in admiralty may cause more confusion than a clean-cut decision demonstrating the need of revision. To our minds this case shows the desirability of making the civil rules directly applicable in admiralty (with, of course, such additions on peculiar subjects, such as limitation of liability, as may be needed) without the confusion and question which may follow from a recopying of parts. At the very least the adoption of the subpoena rule, F.R.C.P. 45 (e), if not of the deposition rule, F.R.C.P. 26, seems a necessity. Meanwhile we are constrained to hold that the reference to oral examination in Admiralty Rule 32 C is only to that taken by virtue of the *de bene esse* statutes which remain applicable in admiralty, and that depositions are not admissible in evidence, except as provided in those statutes."

Republic of France v. *Belships Co., Ltd. (Skibs A/S.* U.S.D.C., 94 F. Supp. 912 at 913, District Court Judge Holtzoff (sitting by designation),

"The question presented is whether local Admiralty Rule 46, covering depositions in admiralty cases, is valid. The rule provides that the taking and use of depositions shall be governed by the F.R.C.P., 28 U.S.C.A., except that their use shall be limited in the manner expressly provided in the Rule. It is urged that this rule is inconsistent with the General Admiralty Rule 46 promulgated by the Supreme Court, 28 U.S.C.A., which provides that 'in all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties.'

"The general rule, however, relates only the manner in which the trial shall be conducted. It does not bear on matters preliminary to the trial. Under modern practice, depositions may be taken for purposes of discovery as well as for use at the trial. It necessarily follows, therefore, that by local rule, the District Court may permit the taking of depositions, since their use for discovery does not contravene the general rule. The person taking the depositions is not required to specify the manner in which they are to be used."

Rolships Co., Ltd., Skibs A/S v. *The Republic of France*, 184 F. 2d 119, U.S. Court of Appeals, Second Circuit, August 30, 1950, *Per curiam*, Judges Swan, Clark and Frank, Circuit Judges,

"We fail to see how the taking of depositions of witnesses who have their own remedy if they are improperly subpoenaed and whose testimony has not been and may never be offered in evidence at the trial satisfies the standards. Accordingly we dismiss the petition."

(Question brought before Court on Writ of Mandamus directed to District Judge prohibiting him or any of the judges from taking any steps to enforce the taking of

depositions of two witnesses pursuant to notice served under a local admiralty rule for the taking of depositions in admiralty cases, formerly Local Admiralty Rule 46, now Local Rule 32.)

This case represents an excellent example of the need of oral pre-trial depositions. The two deceased employees of the respondent were drowned at or near Detroit, Michigan. They both resided in Illinois. The decedents left surviving them a total of six minor children and their respective widows. All witnesses to this occurrence were employees of the respondent. The heirs, through their respective personal representatives, need information to prosecute their respective actions. To have to resort to written interrogatories whose answers are actually prepared by legal counsel after discussion with the particular person is a poor substitute for the oral pre-trial deposition. Written interrogatories are helpful in admiralty when the witness is away at sea. Justice will suffer if the suitors and claimants are not permitted to take oral pre-trial depositions.

Petitioners do not believe that an argument contrary to the decision below need be made in this petition. This is purposely done because the decision of the Court below adequately presents both sides of the various problems. Moreover the issue presented clearly involves this court's interpretation and construction of its own admiralty rules.

The finding of the Court below, contrary and deliberate to the findings of other circuits and district courts cited, squarely places for the first time before this court an almost unbelievable and important problem, considering this advanced day and age of accepted discovery practice.

Upon greater reflection of the authorities cited, especially in those circuits with considerable admiralty experience, it seems astonishing to see a court plunge back into the dark ages of judicial procedure.

This Honorable Court's acceptance of this petition for a Writ of Certiorari would determine the following:

1. Establish uniformity between the various Courts of Appeal.

2. Solve the enigma concerning oral depositions for discovery under U.S. Admiralty Rule 32 C.

3. Explicitly spell out the authority vested in district courts by U.S. Supreme Court Admiralty Rule 44 and 28 U.S.C.A. 2071 and 28 U.S.C.A. 2073.

CONCLUSION.

For the foregoing reasons, we urge this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to the end that the order of that Court may be reviewed.

Respectfully submitted,

HAROLD A. LIEBENSON,
1 North LaSalle Street,
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RAndolph 6-9242,
Attorney for Petitioners.

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RAndolph 6-9242,
Of Counsel.

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12516 SEPTEMBER TERM, 1958 - JANUARY SESSION, 1959

H. LESLIE ATLASS,
Petitioner,
v.
HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois,
Respondents.

Original Petition for Writ of Mandamus or Prohibition.

March 31, 1959

Before DUFFY, *Chief Judge*, HASTINGS and PARKINSON, *Circuit Judges.*

HASTINGS, *Circuit Judge.* We have before us the petition of H. Leslie Atlass for the issuance of a writ of mandamus or prohibition to be directed to the Honorable Julius H. Miner and the Honorable Edwin A. Robson and any other Judge of the United States District Court for the Northern District of Illinois, prohibiting the enforcement of an order entered by Judge Miner directing petitioner and others to submit to oral discovery deposition in an admiralty proceeding now pending in the district court.

The proceeding below is entitled, "In the Matter of the Petition of H. Leslie Atlass for exoneration from or limi-

tation of liability as owner of a certain vessel known as Yacht Sis", in the United States District Court for the Northern District of Illinois and there numbered 57 C 724. This proceeding was first assigned to Judge Miner who, after hearing oral argument on the motion of certain claimants and petitioner's objections thereto, on November 24, 1958, entered an order granting the movants leave to take the depositions of petitioner and others named therein. The cause was subsequently reassigned to Judge Robson before whom it is now pending. The order of November 24, 1958 is under attack in the present petition. In answer to a rule to show cause the respondents have filed their response and memorandum.

At the outset it can be said that we agree with respondents that mandamus and prohibition are extraordinary remedies and should be reserved only for the most extraordinary causes. This court has been slow to resort to these remedies in the exercise of its superviory powers over the district courts and we have been unwilling to allow their use as a substitute for appeal *Ex Parte Fahey*, 332 U.S. 258, 259-260 (1947). However, believing as we do that the critical issue raised at this juncture strikes at a fundamental procedural question, to await its determination until the hearing of an appeal on the merits of the case would afford a clearly inadequate remedy. Further, the resolution of this question will affect procedure in all admiralty proceedings in the Northern District of Illinois and may serve to avoid a conflict in the district courts of this circuit. Since we are here concerned with the rulemaking power of the district courts, our present consideration may likewise serve to crystallize this problem and afford a clear opportunity for its further review if such is found to be necessary. Accordingly, we shall determine this petition on its merits. See *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 31 (1943); *McCullock* v. *Cosgrave, Judge*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Co.* v. *James*, 272 U.S. 701, 705 (1927).

The motions of the claimants below on which the order of November 24, 1958 was based recited in part:

> "FOR AN ORDER, *pursuant to Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil Procedure*, granting the claimant and complainant leave to take the oral depositions of H. Leslie Atlass, * * *, material witnesses herein, *for the purposes of discovery only*, * * *." (Our emphasis.)

Respondents contend that the words "Admiralty Rule 32" in the foregoing motion refer to District Court Admiralty Rule 32, rather than Supreme Court Admiralty Rule 32 as petitioner urges, and we shall accept this interpretation in our subsequent consideration of this matter.

The District Court for the Northern District of Illinois has adopted thirty-three Admiralty Rules covering various phases of admiralty practice. Among those is Rule 32 which provides:

> "The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute and except that their use shall be limited as hereinafter set forth. * * *." (Here follow the provisions relating to the use of depositions.)

The ultimate question before us for determination relates to the validity of this rule. Does the district court have the power through adoption of this rule to require a party in an admiralty proceeding to submit to oral discovery deposition?

Rule-making power generally is vested in all federal courts by Congress pursuant to 28 U.S.C.A. § 2071. Congress has given authority to the Supreme Court of the United States to make admiralty rules for the district courts in 28 U.S.C.A. § 2073, which provides in part as follows:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the district

courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States."

Certainly one of the purposes the Congress must have intended was to achieve uniformity in admiralty practice and procedure:

> "The admiralty and maritime jurisdiction being, by the Constitution, entirely transferred from the States to the general government and made a purely Federal jurisdiction, of limited extent and peculiar character, it was from the outset deemed desirable that it should be uniform throughout the States, • • •." 2 Benedict, Admiralty 2 (6th Ed. 1940).

Under authority of 28 U.S.C.A. § 2073, the Supreme Court has from time to time promulgated Rules of Practice in Admiralty and Maritime Cases, the present rules having been put into effect on March 7, 1921. See Title 28 U.S.C.A. It is undisputed that such rules have the force of statute.

The Supreme Court has authorized the district courts to make local admiralty rules pursuant to its Admiralty Rule 44, which provides:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, *provided the same are not inconsistent with these rules.*" (Our emphasis.)

Respondents here contend with much persuasiveness that their local District Court Admiralty Rule 32 was promulgated and fully authorized by Congress and the Supreme Court by virtue of 28 U.S.C.A. § 2071 and § 2073, and Supreme Court Admiralty Rule 44. It will be noted in this connection that local District Court Admiralty Rule 32 by its express terms adopts the Federal Rules of Civil Procedure.

In adopting the Federal Rules of Civil Procedure, 28 U.S.C.A., for the government of civil proceedings in the

district courts, the Supreme Court prescribed the practice relating to depositions and discovery in Rules 26 to 37, inclusive. In Rule 81, the Supreme Court determined the general applicability of all of the Federal Rules of Civil Procedure and expressly limited their application in admiralty proceedings in the following language.

> "Rule 81. Applicability in General.
> "(a) To What Proceedings Applicable.
> "(1) *These rules do not apply to proceedings in admiralty.* * * *." (Our emphasis.)

It is conceded that the Supreme Court has not made any provisions for the taking of oral discovery depositions in its Admiralty Rules. However, the Supreme Court has amended the present Admiralty Rules of 1921 on several occasions: In 1930, to direct that opinions upon trials of issues should find facts and state conclusion of law (Rule 46½); in 1932, to regulate the review by the court of a report by a commission (Rule 43½); and "most important of all, in 1939, to adopt seven of the Rules of Civil Procedure of 1938 relating to interrogatories, discovery, examination before trial, and scope of examinations and cross-examinations." 2 Benedict, Admiralty 2-3 (6th Ed. 1940). Thus, the Supreme Court, in their Admiralty Rule 31 (written interrogatories to parties), Rule 32 (discovery and production of documents), Rule 32A (physical and mental examination), Rule 32B (admission of facts and genuineness of documents) and Rule 32C (refusal to make discovery), adopted the identical text of Rules 33, 34, 35, 36 and 37, respectively, of the Federal Rules of Civil Procedure. *It did not amend its Admiralty Rules to adopt Rule 26, F.R.C.P., 28 U.S.C.A. to provide for discovery by deposition.* It is not for us to guess or speculate why this provision was omitted, but discovery by deposition is all the more conspicuous by its absence.

In passing, it may be observed that in 1939 the Supreme Court further amended its Admiralty Rules by adopting Rule 46A (scope of examination and cross-examination) and Rule 46B (record of excluded evidence) by using the identical text of Rule 43(b) and (c), F.R.C.P., 28 U.S.C.A.,

respectively; and in 1942, by adopting Rule 44½ (pre-trial procedure; formulating issues) which states: "Rule 16 of the Rules of Civil Procedure shall be applicable in Admiralty." The obvious effect of these bodily adoptions of specific Federal Rules of Civil Procedure is to give uniformity in these matters to practice and procedure in admiralty proceedings in all district courts.

The logical inference from this course of conduct on the part of the Supreme Court is that, if it had intended that discovery by deposition be permitted in district court admiralty procedure, it would have expressly authorized it when making its 1939 amendments. It is further significant that it did not leave the adoption of pre-trial procedure to local rule-making when it expressly made such a provision in 1942.

In reaching this conclusion we find ourselves in disagreement with the Third Circuit where, in *Dowling* v. *Isthmian S.S. Corporation*, 3 Cir., 184 F. 2d 758 (1950), in an extended opinion by the learned Judge James Alger Fee (sitting as a district judge with the Third Circuit and now on the bench of the Court of Appeals for the Ninth Circuit), that court reached a contract result. No local rule was involved in that case. The court upheld the right of the district court to order a *party* to submit to oral discovery based upon its determination that it was in accord with "common usage" in admiralty proceedings. The court indicated: "It is not intended by this discussion to say or even to intimate that such an order should be adopted in any particular case or that discovery should ever be allowed. *The matter should be left to the determination of the admiralty judge.*" (Our emphasis.) (*id.* at 787). In dicta, the court said that it felt the district court "could adopt a local regulation reinstating the old practice, since there has never been a specific Rule nor a statute upon the subject of examination of a party before *trial.*" (Footnotes omitted.) (*id.* at 774-775) It is difficult for us to accept this reasoning persuasive as it is. If such a course were followed we would have an open invitation to a complete lack of uniformity in oral discovery by deposition in admiralty.

Judge Fee recognizes (at page 773) that "[t]here is a violent conflict among the ultra-modern opinions, written since the adoption of the recent statute and the amendments to the Admiralty Rules by the Supreme Court of the United States." The cases Judge Fee thus refers to are those which hold that the absence of a Supreme Court rule on oral discovery in admiralty is a limiting factor prohibiting such discovery. (Cases cited in footnote 44 of Judge Fee's opinion.) The author states that "[t]hese decisions will not be considered. * * * [T]he conclusions of these opinions should have been formulated in terms of empiricism rather than in terms of power of the court." *Ibid.* The opinion further recognizes the proper though limited use of depositions *de bene esse* which are provided for in admiralty proceedings only.[1] However, that court expressed the view that the *de bene esse* statute did not operate to the exclusion of other oral discovery by deposition.

Respondents argue that "if any inference can be drawn from the Admiralty Supreme Court Rules, it is clear under Supreme Court Rule 32C, the Supreme Court approved the propriety of taking discovery depositions in Admiralty." The following part of Rule 32C is cited as applicable:

> "If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer."

Respondents rely upon *Brown* v. *Isthmian Steamship Corporation*, D.C. E.D. Pa., 79 F. Supp. 701 (1948), in which the question presented was: "Has a party to a suit in admiralty the right to take the testimony of the other

[1] The *de bene esse* act (R.S. 863-865) was formerly 28 U.S.C.A. §§ 639-641. It is now printed as a note preceding 28 U.S.C.A. § 1781 with the notation: "Former sections 639-641 of Title 28 are applicable to admiralty proceedings only." See *Mercado* v. *United States*, 2 Cir., 184 F. 2d 24, 27 (1950).

party by deposition upon oral examination for the purpose of discovery?" The court in that case noted the absence of a Supreme Court Admiralty Rule corresponding to Rule 26, F.R.C.P., but held that, although no instance of the use of this procedure in admiralty had been called to its attention, "it seems plain that the Supreme Court, when it promulgated the Admiralty Rules, must have considered that this mode of procedure was available to parties in admiralty and was in accordance with the usages of admiralty courts. * * * It is inconceivable that the Supreme Court, by means of the elaborate and detailed terms of Rule 32C would have given a suitor in admiralty a method of enforcing a right that did not exist." (*id.* at 701-702)

To the contrary, is another district court holding in *Mulligan* v. *United States*, D.C. S.D. N.Y., 87 F. Supp. 79, 80-81 (1949). In this opinion, Judge Rifkind had precisely the same question before him. Taking cognizance of the ruling in *Brown* and that it was predicated on Admiralty Rule 32C, although it was "acknowledged [by the author of the *Brown* opinion] that the practice was unknown to him and that no instance of its use had been brought to his attention"; and after noting the 1939 amendments to the admiralty rules by the Supreme Court (Rules 31, 32, 32A, 32B and 32C), the court goes on to say:

> "Significant is the omission from the Admiralty Rules of a provision corresponding to Civil Rule 26(a) which expressly establishes the practice of deposition upon oral examination for the purpose of discovery or for use as evidence. The omission of so important a provision could hardly be accidental.
>
> "Three possible explanations present themselves. One is that the right to oral examination for purposes of discovery was such an established part of admiralty practice that explicit provision for it was deemed unnecessary by the revisers of the Admiralty Rules. *Such an explanation does not accord with the facts of history.* 3 Benedict on Admiralty, 6th Ed., 1940, 34.

"A second explanation is that oral examination for purposes of discovery was not used in admiralty and the revisers did not intend to introduce this feature of the new Civil Rules into admiralty procedure. Under this theory, the language in Rule 32C which refers to oral examination is an oversight on the part of the draftsmen who, when incorporating Rule 37 of the Civil Rules, neglected to prune out the inapplicable language.

"A third explanation is that the revisers did not intend to authorize oral discovery proceedings and that the reference in Rule 32C to oral examinations relates to the kind of oral examination which is authorized in admiralty, namely, de bene esse depositions under 28 U.S.C.A. § 639 (pre-revision designation). This explanation, it is true, gives to the words of 32C a different content than the same words have in Civil Rule 37. But there is no reason why they should have the same. The advantage of this reading is that it overcomes the necessity of attributing to the revisers of the Admiralty Rules either a historical inaccuracy or the careless inclusion in 32C of the inapplicable language borrowed from Civil Rule 37." (Footnotes omitted.) (Our emphasis.)

The Second Circuit, in *Mercado* v. *United States*, 2 Cir., 184 F. 2d 24 (1950), in an opinion by Judge Clark, gave approval to *Mulligan* in so far as it applied to the question in *Mercado*, which was whether an oral deposition not taken under the *de bene esse* statute was admissible in evidence, and adopted Judge Rifkind's reasoning. The court held that the reference to oral examination in Admiralty Rule 32C is only to that taken by virtue of the *de bene esse* statutes, which remain applicable in admiralty, and that depositions are not admissible in evidence except as provided in those statutes.

Judge Clark, now Chief Judge of that circuit, long active in the development of federal civil procedure, although of the view that the admiralty rules should encompass the broad discovery provisions of Rule 26, F.R.C.P.,

nevertheless adhered to the view that this should not be attempted through the judicial process. His views in this respect are well worth noting:

> "*Nevertheless we are not directly a reform organization*, and under the usual ground rules for judicial action it is difficult to get away from Judge Rifkind's construction as a method of rationalizing the diverse provisions before us. *We are the more constrained to this regrettable conclusion because a doubtful extension of the civil rules in admiralty may cause more confusion than a clean-cut decision demonstrating the need of revision.* To our minds this case shows the desirability of making the civil rules directly applicable in admiralty (with of course such additions on peculiar subjects, such as limitation of liabilty, as may be needed) without the confusion and question which may follow from a recopying of parts. At the very least the adoption of the subpoena rule, F.R.C.P. 45(e), if not of the deposition rule, F.R.C.P. 26, seems a necessity. Meanwhile we are constrained to hold that the reference to oral examination in Admiralty Rule 32C is only to that taken by virtue of the *de bene esse* statutes which remain applicable in admiralty, and that depositions are not admissible in evidence except as provided in those statutes. • • •" (Our emphasis.) (*id.* at 29)

The opinion further noted the adoption of a local admiralty rule in the Southern District of New York (as has been done in a few other districts) with this observation:

> "Thus, by chance rather than design, there has developed a quite troublesome, though rather unnecessary, question of practice, as the judges in the Southern District have recognized by attempting to correct it so far as they can by recent local rule.[2] We are

[2] In footnote 2 to the text of his opinion, Jud. Clark pointed out: "Local Admiralty Rule 46 of the United States District Court for the Southern District of New York, adopted May 10, 1950, provides that the taking and use of depositions shall be governed by the Federal Rules of Civil Procedure except that their use as evidence shall be under three stated conditions which, so far as the present situation is concerned, coincide with those of the *de bene esse* statute. The court properly hesitated to go further, since only the Supreme Court has the authority to supersede statutes. 28 U.S.C.A. § 2073 *supra*."

tempted to cut the Gordian knot by forthrightly applying the modern federal practice as we have done in substance in other cases. * * *." (*id.* at 28-29)[2]

The court did not pass on the validity or invalidity of this local rule since the rule was not before it.

Two district judges sitting in the Southern District of New York have taken a position of supporting local Admiralty Rule 46 of that district. In *Republic of France* v. *Belships Co., Limited, Skibs A/S*, D.C. S.D. N.Y., 91 F. Supp. 912 (1950), Judge Holtzoff held that such local admiralty rule was valid, and that it was not inconsistent with Supreme Court Admiralty Rule 46[3] nor with the *de bene esse* statute. A writ of mandamus and prohibition was denied *per curiam* in that case by the Second Circuit, 184 F. 2d 119 (1950), the court holding that, although it had the authority to issue the writ in such a case, it did not elect to do so since the witnesses had their own remedy if they were improperly subpoenaed and because their testimony had not been and might never be offered in evidence at the trial.

In *Ludena* v. *The Santa Luisa et al.*, D.C. S.D. N.Y., 95 F. Supp. 799 (1951), Judge McGohey held the same local Admiralty Rule 46 to be valid. He relied upon Judge Fee's opinion in *Dowling* v. *Istl[illegible]an S.S. Corporation*, *supra*. In so doing he stated: "These views seem irreconcilable with Judge Rifkind's views on Admiralty's historical powers which were accepted by the Court of Appeals in *Mercado* v. *United States* [*supra*]. Reconciliation of these views is not necessary here. Neither is a choice between them, even if this court were free to make it. In the *Mercado* case, the Court of Appeals noted Local Admiralty Rule 46 which had been but recently adopted. While it did not pass on its validity, neither did the court criticize or cast doubt on its validity. Accordingly, I hold the rule valid." (Footnotes omitted.) (*id.* at 791) The court did not pass upon the use of the deposition at the

[3] Supreme Court Admiralty Rule 46 provides in part: "In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties."

trial. There was no review of this holding by the Second Circuit.

It is not necessary hereto dwell upon the broad question of the right to take depositions generally. Neither have we attempted the citation of the many authorities relating to the rule-making powers of the courts, nor other district court decisions more akin to the problem at hand. We have said enough to illustrate the conflict and confusion which have arisen as to historical practices and procedures in admiralty and the attempts to fill in the gaps by judicial decree and local rules. Apparently, no Court of Appeals has determined this question in its relation to a local district court admiralty rule. This explains our feeling that we should do so, reluctant as we are to employ an extraordinary remedy for this purpose.

Fundamentally our determination of this issue must turn upon the nature of our approach to the solution of the problem. We could with good reason adopt a liberal attitude and say that oral discovery by deposition is recognized and properly used with good results in civil matters, and that it would serve litigants to the same advantage in admiralty. Or, we could say, with equal persuasion, that it is not for us to determine what is desirable in admiralty practice and procedure; and that, if discovery depositions are to be authorized, this can be brought about clearly and expeditiously by the simple method provided by statute.

"An admiralty deposition may only be taken for the purpose of securing evidence; it may not be taken for the purpose of discovery. For the present, the Federal Civil Rules in this respect are more liberal than the admiralty rules, which reverses the historic situation. It is to be hoped that Congress may by legislation permit the Supreme Court to promulgate the substance of Civil Rule 26(a) as an admiralty rule." (Footnotes omitted.) 3 Benedict, Admiralty 34 (6th Ed. 1940).

However desirable we may think discovery by oral deposition in admiralty may be, we are firm in our conclusion that such a result should be reached through the leg-

islative process rather than by judicial determination. The temptation to legislate by judicial pronouncement is ever present and some may argue is all too frequently employed. The plain and simple course here is by Supreme Court amendment with Congressional sanction. As long as it shall be the legislative policy that civil rules shall not apply in admiralty, except as they are made applicable by the method indicated, we believe that to circumvent the legislative process through local rule-making power is, in this instance, unwise and may lead to confusion and lack of uniformity and is beyond the power of the local district court.

Summarizing our position, the Federal Rules of Civil Procedure generally do not apply in admiralty. The Supreme Court has the power to make admiralty rules for the district courts. The district courts are authorized to make local admiralty rules not inconsistent with the Supreme Court Admiralty Rules. The Supreme Court has not seen fit in its admiralty rules to authorize oral discovery by deposition. Although the Supreme Court has not by rule prohibited the taking of such discovery by deposition, yet it must have had this provision before it when making its 1939 amendments leading to the adoption of most of the other discovery practices in the Federal Rules of Civil Procedure. We are compelled to draw the inference that the local admiralty discovery rule is inconsistent with the Supreme Court Admiralty Rules. To quote again from Judge Clark: "We are the more constrained to this regrettable conclusion because a doubtful extension of the civil rules in admiralty may cause more confusion than a clean-cut decision demonstrating the need of revision." *Mercado* v. *United States, supra* at 29.

We hold that the local Admiralty Rule 32 of the District Court for the Northern District of Illinois is invalid. The writ of mandamus and prohibition prayed for by petitioners will issue, directing Judge Miner to vacate his order of November 24, 1958 which granted claimants leave to take the depositions of petitioner and others, and prohibiting Judge Robson and any other Judge of the United States Court for the Northern District of Illinois to whom this cause may be assigned from enforcing the same.

FIRST CIRCUIT LETTERS

(Letterhead of Jerome Golenbock)
New York, N. Y.

June 3, 1959

Director and Liebenson, Esqs.
Suite 941
One North LaSalle Street
Chicago 2, Illinois

Gentlemen:

I practice law in the Second Circuit and the First Circuit, having an office in New York and San Juan, Puerto Rico, with considerable emphasis on admiralty cases. It is common practice in both of my offices in both circuits to utilize oral discovery depositions in admiralty. On no occasion, to my memory, has anyone questioned the right to take such a pre-trial deposition.

Very truly your,
/s/ Jerome Golenbock
Jerome Golenbock

JG:er

(Letterhead of Nathan Greenberg)
Boston, Mass.

June 5, 1959

Harold A. Libenson, Esq.
Director and Liebenson
One North LaSalle Street
Chicago 2, Illinois

Dear Mr. Liebenson:

In response to your letter of June third, it is the practice here of employing oral pretrial depositions.

The question of the legality point has never been tried out in court.

Very truly yours,
/s/ N. Greenberg
Nathan Greenberg

NG:HS

SECOND CIRCUIT LETTERS

(Letterhead of Burlingham, Hupper & Kennedy)
New York, N. Y.

American Trader
Caltex Liege
August 27, 1957

June 3, 1959

Director & Liebenson
1 North LaSalle Street
Chicago 2, Illinois

Gentlemen:

In connection with your petition to the Supreme Court of the United States for a writ of certiorari in case No. 12516 decided on March 31, 1959 by the Circuit Court of Appeals for the 7th Circuit, permit me to say that I regard a decision that pre-trial oral discovery depositions in admiralty is most unfortunate and should, in my opinion, be corrected by the Supreme Court. My firm appears almost exclusively for defendants in maritime cases, and we find that pre-trial discovery depositions are of the utmost importance and of great benefit. I consider them essential particularly in view of the fact that complaints or libels in injury cases need not set out the cause of action in any detail, and as a practical matter the only way the defendant can ascertain the nature of the claim being made is to examine the plaintiff or libellant in a pre-trial deposition. To deprive respondents in admiralty of this right would work a serious hardship in almost every case.

Very truly yours,
Burlingham, Hupper & Kennedy
By /s/ Eugene Underwood

EU:vc

(Letterhead of Lebovici and Safir)
New York, N. Y.

June 3, 1959

Director and Liebenson, Esqs.
1 North LaSalle Street
Chicago 2, Ill.

Att: Mr. Harold A. Liebenson

Gentlemen:

Your letter of May 22, 1959, addressed to Mr. Philip F. Di Costanzo has been directed to my attention. Rule 32 of the Admiralty Rules printed in Rules of United States District Courts for the Southern and Eastern Districts of New York provides as follows:

"(Southern District) The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except that their use shall be limited as follows:

Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is bound on a voyage to sea, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the depositions; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.

(3) If only part of a deposition is offered in evidence by a party, an adverse party may require him

to introduce all of it which is relevant to the part introduced, an any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

This rule shall be superseded by any subsequent statutes, Supreme Court admiralty rules or agreement of parties.

Note:—The text of this rule was promulgated by order of the court (Southern District) dated May 10, 1950."

My practice has specialized in the representation of alien seamen in the prosecution of their personal injury and wage claims against non-United States flag vessels. As a result a large proportion of our practice is concerned with cases pending on the admiralty side of the court as distinguished from the civil side.

It has been our almost uniform experience that just as regularly as an answer is filed in response to a libel previously served upon a respondent, that counsel for the said respondent likewise serves a notice to take the oral deposition of the libellant in person. At the time that the oral deposition is taken it is also universal practice for arrangements for counsel be made for the physical examination of the libellant in a personal injury case, in the event that the respondent, has not already had the said physical examination. Likewise, as may be noted from the rules quoted above, the same opportunity for oral deposition is provided to the libellant as is provided to the respondent.

It needs no statistics to prove that the Southern District of New York has processed and continues to process a larger number of such claims than any other District Court in the United States. It has not come to my attention that despite the enormous number of claims so processed through the court that any one has successfully disputed the right of either side to take the depositions provided for by these rules. The result has been of course that the defendant universally insists upon the right to have these depositions and in a large number of cases, the libellant likewise avails himself of the privilege provided by this rule.

Very truly yours,
Lebovici & Safir
By /s/ Herbert Lebovici

HL:hz

(Letterhead of Marvin Schwartz)
New York, N. Y.

May 26, 1959

Harold A. Liebenson, Esq.,
Director and Liebenson
1 North LaSalle Street
Chicago 2, Illinois

Re: Pre-trial Oral Discovery Depositions

Dear Mr. Liebenson:

I am aware of your Seventh Circuit decision and it came as a great surprise to those of us who do maritime work. As you indicate, oral discovery depositions have become such an every-day occurrence, that to question them, let alone rule against and declare invalid a rule for them, was amazing. It would seem apparent, that such discovery depositions are of great advantage to both sides in the preparation of their case for trial, and equally important, in evaluating their cases for settlement.

If there is anything else that I can do for you in this matter, please do not hesitate to let me know.

Very truly yours,
/s/ Marvin Schwartz
Marvin Schwartz

MS:p

THIRD CIRCUIT LETTERS

(Letterhead of Freedman, Landy and Lorry)
Philadelphia, Pa.
May 26, 1959

Harold A. Liebenson, Esquire
Suite 941, One N. LaSalle Street
Chicago 2, Illinois

Dear Mr. Liebenson:

This is in response to your letter of May 22, 1959.

I quite agree that your court's holding that your local admiralty rule 32 is invalid is in itself a very erroneous decision. However, I must say that your impression that the taking of oral examinations in admiralty is not a routine matter as it is in cases brought on the civil side of the court. We have in a number of cases succeeded in obtaining oral examinations in admiralty, but only by petition and with leave of court, upon cause shown. The practice in this respect is governed by the decision of *Dowling* v. *Isthmian S.S. Corp.*, 184 F. 2d 758 (CA 3, 1950), from which you will note that such examinations can be obtained only after cause has been shown and with leave of court.

The question might become moot in the not too distant future if the Supreme Court should adopt a new set of rules for admiralty practice which would remedy this situation, among other things.

I hope the foregoing is of help to you.

Very truly yours,
/s/ Abraham E. Freedman

AEF:mjw

(Letterhead of Baker, Garber & Chazen)
Hoboken, N. J.

June 3, 1959

Director and Liebenson, Esqs.
Suite 941
One North LaSalle Street
Chicago 2, Illinois

Attention: Harold A. Liebenson, Esq:

Dear Mr. Liebenson:

As you know, this office practices extensively in admiralty cases. It has been our experiences that it is a common practice to utilize oral discovery depositions in admiralty and it has been our further experience that the Judges of the United States District Courts for the Southern District of New York, for the Eastern District of New York, and in New Jersey, have, without question, permitted oral discovery depositions in admiralty.

As a matter of fact, an admiralty case in which we appeared for the libellant and which has just recently been reviewed and affirmed by the United States Supreme Court is *M/V Tungus* v. *Skovgaard*, U.S. 79 S.Ct. 503 L.Ed. 2d (1959).

In this case, as in all other admiralty cases, oral discovery depositions were utilized by both libellant and respondent.

Very truly yours,
Baker, Garber & Chazen
By: /s/Nathan Baker

MG:rmf

FOURTH CIRCUIT LETTERS

(Letterhead of Sidney H. Kelsey)
Norfolk, Va.
May 26, 1959

Harold A. Liebenson, Esquire
Attorney at Law
Suite 941
One North LaSalle Street
Chicago 2, Illinois

Dear Mr. Liebenson:

I have read the Seventh Circuit synopsis of opinion in your case in Law Week regarding pre-trial discovery depositions in admiralty.

The practice in the Eastern District of Virginia has been without exception in the allowance of pre-trial oral deposition of witnesses in admiralty. The Honorable Walter E. Hoffman, United States District Judge at Norfolk, Virginia is fully cognizant of the conflict in circuits but notwithstanding the absence of a general admiralty rule, he takes the position that discovery should be allowed as in F.R.C.P. 26.

I feel confident that you will get your Writ as the Supreme Court consistently grants writs to resolve conflicts of circuits. You may of course use this letter in any proper way you may desire.

Very sincerely yours,
/s/ Sidney H. Kelsey

SHK:ir

(Letterhead of Sol C. Berenholtz)
Baltimore, Md.

May 26, 1959

Harold A. Liebenson, Esquire
Suite 941—One North LaSalle Street
Chicago 2, Illinois

Dear Mr. Liebenson:

This is to acknowledge receipt of your letter of May 22nd 1959 in regard to pre-trial oral discovery depositions in admiralty actions. This is a problem which has concerned the Admiralty Bar in this city for some time. Until May 19, 1958, the District Court of Maryland had no rule in regard to said depositions. The Chief Judge of the Court, Roszel C. Thomsen, in the absence of a rule, held on May 2, 1957 in the case of *Prudential Steamship Corporation v. Curtis Bay Towing Company*, 1957 A.M.C. 1141 that oral discovery depositions may not be taken as a matter of course, but the Court, nevertheless, held that an Admiralty Court may order oral depositions for discovery under appropriate circumstances. Judge Thomsen requested at that time that a committee of the local bar consider and make recommendations to the Court regarding the adoption of a local rule with respect to depositions for discovery. Mr. Berenholtz was a member of this committee.

After considering the report of this committee, the District Court of Maryland adopted Admiralty Rule 46 to take effect on May 19, 1958. Copy of this rule is enclosed. This rule is patterned upon Admiralty Rule 24 in the Eastern District of Virginia, which rule seems to have been approved by the Court of Appeals for the Fourth Circuit in *Papanikolaou* v. *Atlantic Freighters, Ltd.*, 232 F. 2d 663, 665, 1956 A.M.C. 895, 898.

We hope that this letter will be of some value to you in the preparation of your petition for a Writ of Certiorari.

If we can be of any further assistance to you, do not hesitate to contact us.

Yours very truly,
Sol C. Berenholtz
By /s/ Solomon Kaplan
Solomon Kaplan

SK:emf
Enc.

(Letterhead of Jacobson, Rosenblum and Spar)
Charleston, S. Car.
May 26, 1959

Harold A. Liebenson, Esq.
Director and Liebenson
Attorneys at Law
Suite 941—One North LaSalle Street
Chicago 2, Illinois

Dear Mr. Liebenson:

You are hereby advised that we, in the Fourth Judicial Circuit, have commonly adopted the practice of holding pre-trial oral discovery depositions in admiralty cases. As you know, it is often difficult to obtain certain facts by interrogatory, and, since seamen are prone to travel to remote corners of the world, we have found it necessary, as well as expedient, to request oral depositions for discovery in order to be able to abbreviate the time that would otherwise be spent during the trial of a case.

As you undoubtedly know, as a result of the taking of depositions, it is often possible to stipulate with opposing counsel on many of the facts, whereby, it is unnecessary to prove these facts by numerous witnesses.

Our office has handled a number of admiralty cases on behalf of the plaintiff, and in order to show that this practice is rather common, I am enclosing herewith thermo-fax copies of notices of the taking of depositions used by attorneys for the defense in connection with the case of Willie Jones against Farrell Lines, Inc., which

was originally filed in New York and was transferred to Charleston by stipulation between counsel upon order of the District Court wherein the case was filed.

If I can be of further assistance, please do not hesitate to call upon me. With kindest regards, I am

Very truly yours,
Jacobson, Rosenblum & Spar
/s/ I. H. Jacobson
I. H. Jacobson

IHJ/mll
Enclosures

FIFTH CIRCUIT LETTERS

(Letterhead of Mandell & Wright)
Houston, Tex.
May 26, 1959

Mr. Harold A. Liebenson,
Messrs. Director and Liebenson,
Suite 941,
One North LaSalle Street,
Chicago 2, Ill.

Dear Mr. Liebenson:—

I just received your letter of May 22nd. with reference to the decision of the 7th. Circuit Court of Appeals ruling that pre-trial oral discovery depositions are not permissible in admiralty actions. Frankly, I am amazed at the decision.

Here in the 5th. Circuit, we invariably are called upon to submit either Libellant or Respondent for deposition, and this practice is invariably followed in this circuit to submit both Respondents, or their officers or employees, to depositions as a pre-trial oral discovery as well as Libellant.

We are attaching a letter that I hope will be of aid to you. I shall attempt to get some other letters from various other lawfirms practicing admiralty law and forward the same to you.

Sincerely yours,
/s/ Arthur J. Mandell
Arthur J. Mandell
Mandell & Wright

AJM/ER
Enclosure

SIXTH CIRCUIT LETTERS
(Letterhead of Victor M. Todia)
Cleveland, Ohio

June 3, 1959

Harold A. Liebenson, Esq.
Suite 941
One North LaSalle Street
Chicago 2, Illinois

Dear Mr. Liebenson:

Receipt of your letter of May 22, 1959 relative to the unreported decision of the 7th Circuit Court of Appeals which held pre-trial oral depositions not permissible in admiralty actions, is hereby acknowledged.

Our local Admiralty Rule 38 provides that any party, after joinder of issue, and before trial may examine the opposite party with regard to any fact material to the issues. This rule was adopted December 15, 1928 and is still in effect today. During my 30 years of admiralty practice the admiralty lawyers in our district have availed themselves of the desirable and practical use of pre-trial oral discovery depositions afforded by this rule.

I feel confident that the Supreme Court will grant your Writ for Certiorari and will appreciate receiving a copy of your brief.

With best wishes, I am

Very sincerely yours,
/s/ Victor M. Todia
Victor M. Todia

/map

NINTH CIRCUIT LETTERS

(Letterhead of Levinson & Friedman)
Seattle, Wash.

May 25, 1959

Director and Liebenson
Attorneys at Law
Suite 941
One North LaSalle Street
Chicago 2, Illinois

Attention: Harold A. Liebenson, Esquire

Dear Mr. Liebenson:

In reply to your inquiry of May 22nd re the use of discovery procedure in our local District Court, I wish to advise you that on January 3, 1953, our local District Court adopted a local rule, Rule 25-A which provides as follows:

> "All Federal Rules of Civil Procedure relating to discovery and discovery procedures shall be applicable to proceedings in admiralty, provided that the court may upon showing of hardship or inconvenience, deny, limit or condition such applicability."

Under this rule, we have used the Federal Rules of Civil Procedure and this has been the practice to my knowledge of all of the attorneys appearing before our local District Court.

Up to the present time the right of the District Court to challenge the authority of the local court to promulgate such rule has not been raised. Should you wish some more detail as to the number of cases this rule has been in use, I will endeavor to supply it.

Best of luck on your petition for a writ.

Sincerely yours,
Levinson & Friedman

SLL:bfm

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 156

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois,

Petitioners,

vs.

H. LESLIE ATLASS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD B. HAYES
135 South LaSalle Street
Chicago 3, Illinois
Attorney for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 156

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois,

Petitioners,

vs.

H. LESLIE ATLASS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition consists of inaccurate "hit-and-run" statements. Its net result is a wholly false impression.

It isolates a sentence from the opinion below which it reproduces at the outset in capital letters (page 2) expressing disagreement with the result advocated by Judge Fee in *Dowling* v. *Isthmian S. S. Corp.*, 184 F. 2d 758 (CA 3, 1950).

The Petition inexcusably neglects to mention, however, that all Judge Fee had to say on the present question was, by confession, mere *dictum*. He says so.

"THE QUESTION OF WHETHER DISCOVERY CAN BE OBTAINED FROM A PARTY, ALTHOUGH DEBATED, IS REALLY NOT RAISED, SINCE LIBELANT REFUSED TO TESTIFY AT ALL."

Dowling v. *Isthmian S. S. Corp.*, 184 F. 2d 758, 762 (CA 3, 1950).

The simple fact is that there is no conflict of decision whatever on any question presented by the Petition among Courts of Appeal.[1]

We do not understand that this Court will consider certiorari to correct a wayward dictum of a judge in another case. Its Rule 19 indicating "the character of reasons which will be considered" reads: "Where a court of appeals has rendered a decision in conflict with the *decision* of another court of appeals on the same matter;" (Rule 19.1.(b) (Our emphasis)[2]

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[1] Moreover, the Petition's Question "1" (page 2) does not arise. Of course depositions may be taken in admiralty under the well understood de bene esse acts, which Congress deliberately preserved for admiralty alone when F.R.C.P. 26 was adopted for law and equity. See Note preceding 28 U.S.C.A. § 1781; Mercado v. U. S., 184 F. 2d 24, 27 (CA 2, 1950); 28 U.S.C.A. Admiralty Rule 46 (which reproduces, for admiralty, R.S. §861); Ex parte Fisk, 113 U.S.713. But they may not be taken in admiralty "for discovery only" under the provisions of Federal Rules of Civil Procedure, for those rules "do not apply to proceedings in admiralty." (F.R.C.P. 81(a)) This Court's amendments of the admiralty rules in 1939 introduced into admiralty many of the discovery provisions of the F.R.C.P. in haec verba, but significantly excluded F.R.C.P. 26.

[2] It would be supererogation to attack an isolated dictum (espousing what all authorities describe as an "historical inaccuracy." See Mercado v. U. S., 184 F. 2d 24, 28 (CA 2 — 1950).) Suffice it that Judge Fee's industrious essay, which triumphantly finds an oral answer to the issues by a party

The petition also cites *Belships Co., Ltd. Skibs A/S* v. *The Republic of France,* 184 F. 2d 119 (CA 2-1950) as a "decision in conflict" with the holding below (Petition, page 8). Quite the contrary is true. The United States Court of Appeals for the Second Circuit had just held, adopting the reasoning of *Mulligan* v. *U. S.,* 87 F. Supp. 79 (S.D. N.Y. 1949) that depositions unauthorized by the *de bene esse* acts were not allowed in admiralty. *Mercado* v. *U. S.,* 184 F. 2d 24 (CA 2-1950). In *Belships,* a writ of prohibition or mandamus was sought against an order of a district court to take the depositions of witnesses. The Second Circuit held that it had authority to issue "one of these extraordinary writs," but that this should be done only "in extraordinary cases and not as a means of interlocutory appeal;" and that accordingly "we fail to see how the taking of the depositions of witnesses *who have their own remedy if improperly subpoenaed* • • • satisfies *these* standards." (*Ibid,* p. 119. Our emphasis.) It is familiar that prohibition or mandamus are discretionary remedies. *Belships* did not decide that the depositions could be properly allowed. That court, in its discretion, denied a discretionary interlocutory remedy.

In the circumstances of the instant case (where, incidentally, unauthorized depositions were sought not only from witnesses but also from a party) the Court of Appeals held, in its discretion, that appeal from a final order was not an adequate remedy (Opinion, Petitioners'

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[2] (Continued)
in the inquisitorial methods of ecclesiastical courts (but cf. Admiralty Rules 26, 46 and 31, 28 U.S.C.A.) does not discover even one decided admiralty case in the historic admiralty law whether in England or America — although he searches the centuries — holding that depositions for discovery only could be had in admiralty, from party or witness.

Appendix, page 2a) *and the Petition presents here no question for review as to appropriateness of that discretionary determination on a matter of remedy.* (See "Questions Presented for Review," Petition, pages 2 and 3.)

The next alleged "Reason for Granting the Writ" consists of two assertions. One is that the decision of the Court of Appeals conflicts with the decisions of certain *district* courts. Not only is Rule 19.1.(b) of this Court explicitly confined to conflict of decision between courts of appeal (which does not exist on any question presented for review—*vide supra*), and not only do other district judges decide according to the views expressed by the Court of Appeals below (and by the Second Circuit in *Mercado*) but the authors of the Petition themselves foresee that the decision below will bring such few *district* judges as have expressed different views into harmony (Petition, page 11). This they describe as a return to the "dark ages." But that is simply a criticism by the authors of the Petition of the *decisions* of the courts of Appeal (in the case below and in *Mercado*, 184 F. 2d 24 (CA 2-1950)—criticism, moreover, based on a proposition that neither court decided, *viz.*, what the law ought to be. The legal question is what the law is. What it ought to be is a legislative question.

The second assertion in the second "reason" is that the decision of the Court of Appeals conflicts with "the accepted and usual course of judicial proceedings," referring (page 8) to a few divergent decisions in *district* courts, mostly in New York (and all but one prior to the decision of the United States Court of Appeals for the Second Circuit in *Mercado*). In *Mercado*, the *views* advocated *by the Petition* were rejected, precisely because they are not in accordance with "the accepted and usual course of judicial proceedings"—as the Court of Appeals put it,

"the usual ground rules of judicial action." *Mercado* v. *U. S.*, 184 F. 2d 24, 29 (CA 2-1950).

The next "reason" alleged for the writ (Petition, page 9) is an assertion that it creates "non-uniformity in its interpretation" of two statutes and two admiralty rules. *Nothing whatever follows to support that assertion.* Apparently it depends on a few divergent district court determinations previously referred to, which are now brought into line by the decisions of the Courts of Appeal—against which (to Petitioner's displeasure) no *decision* of any court of appeal exists.

The next alleged "reason" is that the Court of Appeals for the Seventh Circuit holds Northern District of Illinois Admiralty Rule 32 invalid. So it does. And no court of appeals ever held such a rule valid. The opinion points that out (Petitioners' Appendix 12a), and Petitioners do not even attempt to deny it.

The next alleged "reason" (Petition, page 9) asserts that the decision below "creates non-uniformity in its interpretation" of F.R.C.P. 81 (a), which is the rule that states, *inter alia,* that the Federal Rules of Civil Procedure "do not apply to proceedings in admiralty." But the decisions of courts of appeal *are* in harmony in the interpretation of that rule in this application (and it is difficult to imagine that they should be otherwise.) The case here, in the District Court, was that a party asked the District Judge to allow him to take depositions for discovery in admiralty (which has its own distinct rules for discovery) according to practices found only in the Federal Rules of Civil Procedure. The aforesaid Rule 81 (a) says that the Federal Rules of Civil Procedure "do not apply to proceedings in admiralty." The District Judge nevertheless ruled, to quote the transcript directly:

"I am going to apply them." The Court of Appeals corrected that. No court of appeals ever held to the contrary. Parenthetically, it will be noted that the Petition completely "ducks" the cogent discussion by the Court of Appeals of the fact that when this Court in conjunction with Congress after almost a decade's experience with the F.R.C.P. in law and equity addressed itself to *discovery in admiralty* in 1939, and incorporated *in haec verba* most of the discovery provisions of the Federal Rules of Civil Procedure into admiralty practice, it pointedly did *not* incorporate F.R.C.P. 26 for discovery depositions into admiralty. (See Opinion, Petitioners' Appendix pages 5a-6a.) *That* rule was left in the F.R.C.P., subject to the continuing mandate: "*These* rules do *not* apply to proceedings in admiralty." (F.R.C.P. Rule 81(a))

The last supposed "reason" for granting the writ is the assertion that the decision below "requires a specific enunciation for the solution of this problem" by this Court. Of course the enunciation by this Court and Congress in enacting and amending the rules, and by the Court of Appeals, is "specific." Petitioners dislike it because it conflicts with their ideas of desirable national policy, asserting that the admiralty rule is anachronistic (belongs in "the dark ages").[3] What they ask is that this Court extend the F.R.C.P. to admiralty by judicial decision. Significantly, since the opinion below was published, this Court had occasion to reject a precisely similar contention.

> "But the Government urges the Court in this particular case to apply the more flexible procedure

[3] "'An admiralty deposition may only be taken for the purpose of securing evidence; it may not be taken for the purpose of discovery.'" 3 Benedict Admiralty, 234 (6th ed. 1940) quoted by the Opinion, Petitioners' Appendix 12a.

utilized in civil cases in federal courts. The Government contends that none of the reasons for limited cross-libels suggested above has any application to the particular facts of this case and that, moreover, the rule has become an anachronism and it is out of line with the practice in specific courts and with the general rules of practice for federal courts. But it should be observed that where the procedure has been changed in this regard it has been the result of legislation or rulemaking and not the decisional process.

"The law on this point in admiralty has been settled beyond doubt in the lower courts for many years and an Admiralty Rule of this Court recognizes this case law. We think that if the law is to change it should be by rulemaking or legislation and not by decision.

"Whether the setoff and cross-libel procedure now operative in admiralty is anachronistic, is not a matter best considered by this Court in a litigation without the benefits which normally accompany intelligent rulemaking—including hearings and opportunities to submit data. In addition to this Court's responsibility for rulemaking, the Judicial Conference of the United States has been given certain responsibilities in this area by the Act of July 11, 1958, 72 Stat. 356:

> " 'The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustified expense and delay shall be recommended by the Conference from time to time to the

> Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.'"
>
> *U. S.* v. *Isthmian S. S. Co.*, 359 U.S. 314, 322-324 (1959).

This was a remarkable confirmation of the decision below:

> "• • • The temptation to legislate by judicial pronouncement is ever present and some may argue is all too frequently employed. The plain and simple course here is by Supreme Court amendment with Congressional sanction. As long as it shall be the legislative policy that civil rules shall not apply in admiralty, except as they are made applicable by the method indicated, we believe that to circumvent the legislative process through local rulemaking power is in this instance, unwise and may lead to confusion and lack of uniformity and is beyond the power of the local district court."
>
> *H. Leslie Atlass* v. *Hon. Julius H. Miner and Hon. Edwin A. Robson*, Petitioners' Appendix 13a.

We call attention to the revealing statement of the Petition (page 15): "Petitioners do not believe that an argument contrary to the decision below need be made in this petition." The fact is that they do not even dare to state their own position, that district judges can merge systems of procedure that this Court and Congress have been careful to keep separate and distinct.

In conclusion: There is no conflict of decision among courts of appeal on any question presented by the Petition. The decision of the Court of Appeals was that if the Federal Rules of Civil Procedure are to be imported into admiralty, that may not be by judicial legislation, and especially not by piece-meal local legislation in occasional

district courts with the inevitable resultant confusion and "forum-shopping," but by the law-making process in the plain and simple way appointed.

The Petition should be denied.

Respectfully submitted,

EDWARD B. HAYES
Attorney for Respondent

EDWARD B. HAYES
135 South LaSalle Street
Chicago 3, Illinois

APPENDIX.

Rules of Decision for Admiralty and Maritime Cases, 28 U.S.C.A. (1950 ed.)

Rule 46. Evidence—how taken

In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. When deemed necessary by the court or the officer taking the testimony or by the parties, a stenographer may be employed who shall take down the testimony in shorthand or otherwise and, if requested by the court or either party, transcribe the same. The fees may be fixed by the court and taxed as costs.

Neither the plain language nor the coded text nor the exact translation of any message or dispatch encoded or encyphered by any department or agency of the United States in war shall be placed of record in pleadings, evidence, or testimony or disclosed in any manner in any proceeding without the prior consent of the department or agency of the United States or allied government which encoded or encyphered such message or dispatch. A paraphrase of the substance of such message or dispatch, prepared and certified as such by an officer of such department or agency, shall be admissible for all purposes for which the plain language message or dispatch would, save for this rule, have been admitted.

28 U.S.C.A. (1928 ed.) § 639 (now found as a footnote preceding § 1781, 28 U.S.C.A. (1950 ed.)

Depositions in Admiralty Cases.

Former sections 639-641 of Title 28 are applicable to admiralty proceedings only. Proceedings in bankruptcy and copyright are governed by Rule 26 *et seq.* of Federal Rules of Civil Procedure. See also General Orders in Bankruptcy Nos. 37 and 38, following section 53 of Title 11, Bankruptcy, and Rule 1 of Copyright Rules of Practice, following section 101 of Title 17, Copyrights.

Former sections 639-641 of Title 28 read as follows:

§ 639. Depositions de bene esse; when and where taken; notice.

The testimony of any witness may be taken in any civil cause depending in a district court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one thousand miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. (R.S. § 863.)

BRIEF FOR THE RESPONDENT ON THE MERITS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 156

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois,

Petitioners,

vs.

H. LESLIE ATLASS,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT ON THE MERITS

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BRIEF FOR THE RESPONDENT ON THE MERITS.

QUESTIONS PRESENTED FOR REVIEW.

1. Do the statutory district courts of the United States, in the absence of statutory authority, have power to require parties and witnesses to give depositions for discovery only?

2. Do the statutory district courts of the United States have statutory authority to require parties and witnesses in admiralty to give depositions for discovery only?

UNITED STATES CONSTITUTION, STATUTORY PROVISIONS AND RULES OF COURT.

UNITED STATES CONSTITUTION

Article III, Section 1:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

PREREVISION JUDICIAL CODE

28 U.S.C.A. 1941 ed.

§ 635. Proof in common law actions

The mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. (R.S. § 861.)

(Repealed June 25, 1948, 62 Stat. 992)

§ 639. Depositions de bene esse; when and where taken; notice.

The testimony of any witness may be taken in any civil cause depending in a district court by deposition *de bene esse,* when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one thousand miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States,

or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. (R.S. § 863.)

Note: Former sections 639-641 of Title 28 are applicable to admiralty proceedings only. They are now found as a footnote preceding § 1781, 28 U.S.C.A. 1950 ed.

§ 723b. Rules in actions at law; supreme court authorized to make

The Supreme Court of the United States shall have the power to prescribe by general rules for the district courts of the United States and for the courts of the District of Columbia, the forms of process,

writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation and thereafter all laws in conflict shall be of no further force or effect. June 19, 1934, c. 651 § 1, 48 Stat. 1064.

§ 723c. Union of equity and action at law rules; power of supreme court

The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* that in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. June 19, 1934, c. 651 § 2, 48 Stat. 1064.

The Federal Rules of Civil Procedure were promulgated by the Supreme Court of the United States pursuant to the authority conferred by the Act of June 19, 1934, c. 651, 48 Stat. 1064 incorporated in sections 723b and 723c of this title.

"The text of the Federal Rules of Civil Procedure, as amended, the Notes of Advisory Committee on Rules, the Commentaries by many law reviews and law journals, and the Notes of Decisions showing the judicial construction of the Rules since their adoption, are set out following.

"The Federal Rules of Civil Procedure became effective Sept. 16, 1938, pursuant to Rule 86, post."

§ 730. Regulation of practice of district courts by supreme courts

The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the district courts. (R.S. § 917.)

(Repealed June 25, 1948 by 62 Stat. 992)

§ 731. Rules of practice in district courts

The district courts may from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title make rules, and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. (R.S. § 918.)

(Repealed June 25, 1948 by 62 Stat. 992)

CURRENT JUDICIAL CODE

28 U.S.C.A. 1950 ed.

"§ 2071. Rule-making power generally

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

"§ 2072. Rules of civil procedure for district courts

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

"§ 2073. Admiralty rules for district courts

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof

but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

FEDERAL RULES OF CIVIL PROCEDURE

28 U.S.C.A. 1950 ed.

Rule 26

Depositions Pending Action

"(a) *When Depositions May Be Taken.* Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. As amended Dec. 27, 1946, effective March 19, 1948."

Rule 81

Applicability in General

(a) To What Proceedings Applicable

"These rules do not apply to proceedings in admiralty. * * *"

ADMIRALTY RULES OF PRACTICE FOR THE COURTS OF THE UNITED STATES.

28 U.S.C.A. 1950 ed.

Supreme Court Admiralty Rule 26

"In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answers of or on behalf of the respondent or claimant to the libels and interrogatories shall be on oath or solemn affirmation; and all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner or except to each interrogatory propounded by the libellant. * * *"

(First adopted in this form in the general revision and reissuance of the Admiralty Rules in 1920—254 U.S. 679 *et seq.*—combining former Rule 27 adopted in 1844 and former Rule 49 added in 1850.)

Supreme Court Admiralty Rule 31

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is

practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party."

(Adopted May 22, 1939, effective September 1, 1939. The subject was originally dealt with in Admiralty Rule 32 of 1844.)

Supreme Court Admiralty Rule 32

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

(This rule was adopted May 22, 1939, effective September 1, 1939.)

Supreme Court Admiralty Rule 32A

"(a) *Order for Examination.* In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all

other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

"(b) *Report of Findings.*

"(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

"(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition."

(This rule was adopted May 22, 1939, effective September 1, 1939.)

Supreme Court Admiralty Rule 32B

"(a) *Request for Admission.* At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or

of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

"(b) *Effect of Admission.* Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding."

(This rule was adopted May 22, 1939, effective September 1, 1939.)

Supreme Court Admiralty Rule 32C

"(a) *Refusal to Answer.* If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer the interrogatory submitted under any provision of law, or upon the refusal of a party to answer any interrogatory submitted under Rule 31, the proponent of the interrogatory may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the

refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

"(b) *Failure to Comply with Order.*

• • •

"(c) *Expenses on Refusal to Admit.*

• • •

"(d) *Failure of Party to Attend or Serve Answers.*

• • •

"(e) *Failure to Respond to Letters Rogatory.*

• • •

"(f) *Expenses Against United States.*

• • • "

(This rule was adopted May 22, 1939, effective September 1, 1939.)

Supreme Court Admiralty Rule 33

"Where either the libellant or the respondent or claimant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the respondent or claimant when and as soon as it may be practicable or may receive a verifi-

cation by agent or attorney with like force and effect as if made by the party."

(First adopted in this form in the general revision and reissuance of the Admiralty Rules in 1920—254 U.S. 679 *et seq.*).

Supreme Court Admiralty Rule 44

"In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

(First adopted in this form in the general revision and reissuance of the Admiralty Rules in 1920—254 U.S. 679 *et seq.*).

Supreme Court Admiralty Rule 46

"In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. * * *"

(First adopted as part of the general revision and reissuance of the Admiralty Rules in 1920—254 U.S. 679 *et seq.*).

THE CASE.

Claimant in admiralty to a limitation fund, moved the district court to apply certain of the Federal Rules of Civil Procedure in that admiralty proceeding, specifying those rules and "Admiralty Rule 32" as follows:

"For an order, pursuant to Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil Procedure, granting the claimant and complainant leave to take the oral deposition of * * * for the purpose of discovery only * * *." (R. 19, 23)

The Federal Rules of Civil Procedure, however, provide:

> "These rules do no apply to proceedings in admiralty." (F.R.C.P. 81(a)(1))

The District Court nevertheless ruled: "I am going to apply them." (R. 29)

Claimant's reference to Admiralty Rule 32 was not to any rule of this Court (R. 86) but to a local rule numbered 32 adopted by judges of the District Court of the Northern District of Illinois, which provides in relevant part:

> "The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute * * *." (R. 51)

The Court of Appeals for the Seventh Circuit issued its prohibition for reasons stated in its opinion (R. 84-96).

The Court of Appeals (R. 96) points out the absence of power in the statutory district court to apply in admiralty the Federal Rules of Civil Procedure (prescribed by this Court with the sanction of Congress for law and equity). It further points out that this would be both unauthorized, and inconsistent with the rules of this Court and the statutes.

The Court of Appeals also makes plain its unwillingness to sanction a crazy-quilt pattern of local judicial legislation by statutory district courts in the important field of discovery, a field which has been occupied (and elaborately provided for) by Federal statutes and the rules of this Court.

The provisions for discovery in admiralty provided by this Court's admiralty rules have not at any time been resorted to below by claimant. In view of the way in which petitioner puts the first of the questions alleged to arise, we point out that no attempt was made to utilize any part of the extensive and elaborate code for discovery in admiralty, prescribed by this Court and no "showing" was made (compare petitioners' Brief page 2, question 1) that the discovery in this admiralty case available under the Admiralty Rules was not wholly adequate to any and every proper purpose.

Petitioner's brief makes other unsupported and incorrect assertions as to the nature of the case. Not one of the witnesses is in the employ of the respondent (compare petitioner's brief 19), and there is nothing whatever to prevent petitioner's counsel from interviewing them—nor even any reason to suppose that they would not favor claimant's cause, if it is not fraudulent.

The distinctive admiralty cause is a proceeding *in rem* against the vessel. It must be brought wherever *the vessel* is found. That is only accidentally the residence of any of the parties. Unlike law and equity, the distinctive admiralty case does not need to be brought at the residence of any party and characteristically is not. In such a system, depositions "for discovery only" become a potent weapon of harassment. That is well proved in those few district courts which undertake to be wiser than this Court and Congress and to import depositions "for discovery only" from law and equity into the admiralty. (See, for example, *Jobbins* v. *American Export Line*, 121 F. Supp. 322 (S.D. N.Y. 1954).)

ARGUMENT.

1. The statutory policy of the United States is to preserve the separate and distinct system of admiralty law.

From the beginning of the nation it has been the statutory and judicial policy of the United States to maintain for admiralty its own system of substantive and adjective law.

> "Since the formation of the Federal government there has been in America a single system of maritime law which operates with general uniformity throughout the United States. This system has its own courts and its own code of procedure. It adheres to its own precedents and cannot be affected by local decision or enactment. In most particulars it differs radically from the system of law administered by the courts of general jurisdiction."
>
> 1 American Jurisprudence, "*Admiralty*," §1, p. 547.

Under the authority of Congress, this Court has prescribed and maintained a comprehensive system of "Rules of Practice and Procedure in Admiralty and Maritime Cases." (28 U.S.C.A.)

a. The innovation of discovery depositions was introduced into the federal judicial system for law and equity in 1938 but was excluded from admiralty practice.

When this Court pursuant to the authority of Congress adopted rules for law and equity in 1938, it introduced the innovation of oral examination before trial for purposes of discovery only, by the provisions of No. 26 of those rules. At the same time it was careful to provide in Rule 81 (a)

(1) thereof that "These rules do not apply to proceedings in admiralty." The District Court ruled, nevertheless, "I am going to apply them." (R. 29) Does a *district* court have the power to merge systems of procedure which Congress and this Court have been careful to keep separate and distinct?

2. Statutory courts of the United States have no powers, including the power to take depositions, except those given by statute. Depositions for discovery are no part of admiralty practice as received in this country.

District courts of the United States are statutory courts. (Constitution, Article III, Section 1.) They have no *powers* except those given by statute.

> "And here, some legal principles interpose themselves for our government; the first of which is, that the powers of the United States courts are conferred by Acts of Congress, and cannot extend beyond the powers conferred."
>
> *U. S.* v. *Lawton*, 46 U. S. 10, 27.

This rule is basic to the federal judicial system whose structure in Art. III, Section 1, represents a compromise between the two opposing views advocated in the Convention of 1789: one, that the Constitution should institute lower federal courts; the other, that there should be no lower federal courts at all. (See, for example, Elliott's Debates, Vol. 5, pp. 158-160, J. B. Lippincott & Co., 1881). The rule fully applies to the power of statutory courts of the United States to take depositions for discovery or to grant any form of discovery.

> "'In short, the courts of the United States are not given discretion to make depositions not authorized by Federal law, * * *'."
>
> *Hanks Dental Association* v. *Tooth Crown Co.*, 194 U.S. 303, 309.

Rejecting a discovery not provided for by applicable statute, this Court holds:

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by *Judge Cooley*: 'The right to one's person may be said to be a right of complete immunity: to be let alone.' Cooley on Torts, 29."
>
> *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250, 252 (1890).

Save only for what is indispensable to exist and function at all as a Court for any purpose, such as protecting its officers and keeping respectful order in the presence of the court while it is in session, statutory courts of the United States have not been held to have any "intrinsic" or "inherent" powers whatever.

> "• • • This argument is in no way impaired by admitting that the judicial powers will extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the Federal tribunals, *and the modes of their action and authority, have been, and of right must be, the work of the legislature.* The existence of the judicial act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by common law." (Our emphasis)
>
> *Cary* v. *Curtis*, 44 U. S., 235, 244 (1845).

a. This Court refrained from incorporating Rule 26 F.R.C.P. into admiralty practice.

As pointed out by the opinion of the Court of Appeals, even authority relied on by petitioner recognizes that depositions "for discovery only" are no part of the historical practice of courts of admiralty. (Opinion, R. 91) Even where this Court's rule allowed discovery interrogatories by the libelant, the same discovery by the claimant could not be given by a district court for the reason that there was no authority to grant it—the practice could not be judicially created, nor borrowed by admiralty from the equity rules.

> "The rules promulgated under the Act of 1842, *supra*, comprehend a complete procedure in admiralty and are independent of any other rules promulgated by the Supreme Court relating to equity procedure, and provide a procedure for discovery of facts as appears in rules 27 and 32, *supra*. While, as stated by the claimant, admiralty courts proceed on equitable principles, and the provisions of the equity rules should obtain, since admiralty courts are not restricted by the technical rules of common law, the admiralty court has laid down its rules of procedure and, as is stated in the Fred E. Richards * *, it would result in confusion to borrow equity rules in an admiralty procedure."
>
> *Princess Sophia*, 269 Fed. 651, 654 (D.C. Wash.—1920).

The leading case under the statute and rules as they now stand is *Mercado* v. *United States*, 184 F. 2d 24 (CA-2, 1950) which expressly approved and adopted the reasoning of *Mulligan* v. *United States*, 87 F. Supp. 79 (S.D.N.Y. 1949). That reasoning is quoted by the Court of Appeals below at Record 91-92:

"Significant is the omission from the Admiralty Rules of a provision corresponding to Civil Rule 26(a) which expressly establishes the practice of deposition upon oral examination for the purpose of discovery or for use as evidence. The omission of so important a provision could hardly be accidental.

"Three possible explanations present themselves. One is that the right to oral examination for purposes of discovery was such an established part of admiralty practice that explicit provision for it was deemed unnecessary by the revisers of the Admiralty Rules. *Such an explanation does not accord with the facts of history.* 3 Benedict on Admiralty, 6th Ed., 1940, 34.

"A second explanation is that oral examination for purposes of discovery was not used in admiralty and the revisers did not intend to introduce this feature of the new Civil Rules into admiralty procedure. Under this theory, the language in Rule 32C which refers to oral examination is an oversight on the part of the draftsmen who, when incorporating Rule 37 of the Civil Rules, neglected to prune out the inapplicable language.

"A third explanation is that the revisers did not intend to authorize oral discovery proceedings and that the reference in Rule 32C to oral examinations relates to the kind of oral examination which is authorized in admiralty, namely, *de bene esse* depositions under 28 U.S.C.A. § 639 (Pre-revision designation). This explanation, it is true, gives to the words of 32C a different content than the same words have in Civil Rule 37. But there is no reason why they should have the same. The advantage of this reading is that it overcomes the necessity of attributing to the revisers of the Admiralty Rules either a historical inaccuracy or the careless inclusion in 32C of the inapplicable language borrowed from Civil Rule 37." (Footnotes omitted.) (Our emphasis.)

The opinion of the Second Circuit adopted the *Mulligan* statement because it is the law. *Mercado* v. *U. S.*, 184 F.2d 24.

Chief Judge Clark of that court and author of that opinion, was active in formulating the Federal Rules of Civil Procedure and since 1935 has been the reporter of the Supreme Court's advisory committee on federal civil procedure. Though his opinion reflects his personal opposition to the plain decision of the law-making authority, that "these rules do not apply to proceedings in admiralty", it also reflects his acceptance of its decision, which he follows, according, as he says, to "the ordinary ground rules of judicial decision;" *i.e.*, that statutory courts of the United States are not legislatures (or, as he puts it, "a reform organization.") It is significant that so well informed a judge declares that this is the law, notwithstanding personal temptation (he uses the word) to sophisticate it. He expresses the hope that the rules will be changed to effect the revolution of merging admiralty with law and equity except in a few instances such as limitation proceedings. (This is a limitation proceeding.) *That was nearly nine years ago.* The Supreme Court was not impressed. There has been no change.

b. The Dowling opinion, insofar as it treats of depositions for discovery in admiralty is confessed dictum. Its history is inaccurate, and its conclusions unsupported by any authority, cited or otherwise.

Petitioners are in error in calling the *Dowling* case the "leading case" on any matter before the Court. Its statements on the subject put forward by petitioners' counsel are, admittedly, pure dictum, discovery not even being involved.

"The question of whether discovery can be obtained from a party, although debated, is really not raised, since a libelant refused to testify at all. The question of whether witnesses can be examined by deposition is not strictly relevant, since examination of a party is sought. The question of whether the *testimony* of a *party* by oral deposition, rather than by written interrogatories, can be taken alone is involved. Finally, what may be done under the Admiralty Rules does not necessarily come before us, since here the party was directed to answer by order of court."

Dowling v. *Isthmian S.S. Corp.*, 184 F. (2) 758, on 762.

The author of this dictum says that deposition-discovery was old Ecclesiastical Court practice and thus old admiralty practice—but anyone willing to examine the citations in his extremely voluminous footnotes will discover that his great diligence *does not find even one admiralty* case allowing oral deposition-discovery, as distinguished from proof—whether in England or America. As pointed out in *Mulligan*, 87 F. Supp. 79 and approved by the Court of Appeals in *Mercado*, his idea that this was ever *admiralty* practice is an "historical error."

(1) The same statutes which Dowling says authorized Ecclesiastical practice required all testimony to be taken in open court.

His "history" is no better when he gets to the Federal statutes. He says that the "musty statutes" of 1789 and 1792 (1 Stat. 93, 94 and 1 Stat. 276) authorized American admiralty courts to use the practice of Ecclesiastical Courts which had a practice derived from the civil law (*Ibid*, p. 764), but those same "musty statutes" required

testimony in admiralty to be taken in open court, except as otherwise provided by the statute. As Judge Fee admits (*Ibid*, p. 769) 1 Stat. 88 required proof in admiralty to be by oral testimony and examination of witnesses as at common law. He elsewhere recognizes that this 1789 statute excludes deposition-discovery as he thinks it was practiced in ancient Ecclesiastical Courts in England, from American admiralty practice (*Ibid*, p. 772) but emphasizes that this provision was repealed in 1842—when the power to make admiralty rules controlling the admiralty practice was by that same act given to the Supreme Court (*Ibid*, p. 772) 5 Stat. 518.[1] He admits that although for a period which he mistakenly puts at "one hundred years" the Supreme Court did not make a rule, there was no "use" of deposition-discovery in admiralty, although the statute of 1789 requiring testimony to be in open court in admiralty had been repealed and the rule-making power given to the Supreme Court as above (*Ibid*, p. 772).

(2) In 1920 this Court reaffirmed the requirement that testimony in admiralty be taken in open court unless otherwise provided by statute (not as otherwise provided by district judges.)

When the Supreme Court did make a rule, it was to reiterate the requirement of the statute of 1789 which, he admits, inhibited the discovery-deposition in admiralty, *viz.*, the requirement that testimony in admiralty shall be taken *in open court* "except as otherwise provided by

[1] The statute he cites as "repealing" the 1789 Act does not repeal it, but merely gives the Supreme Court power to make rules on the subject. (Ibid, 772 n. 39, 5 Stat. 518) When the Supreme Court made a rule it reiterated for admiralty the requirement of R.S. 861 (28 U.S.C. 635 Prerevision, derived from 1 Stat. 88, the 1789 Act) by adopting Admiralty Rule 46, above quoted.

statute." That is Admiralty Rule 46 above quoted which now remains the rule of the Supreme Court *in admiralty*.

In short, the true history is that deposition-discovery in admiralty in this country was inhibited by a statute enacted in 1789 (1 Stat. 88, *supra*), and was never used before or after even though that statute was "repealed" in 1842[2] (5 Stat. 518) when the Supreme Court was given power to make rules (5 Stat. 518). The requirement of the 1789 statute was reaffirmed in 1920 (254 U.S. 698, Rule 46) by this Court's Admiralty Rule 46, that requirement being, that testimony in admiralty shall be taken in open court "except as otherwise provided by statute."

The remarkable conclusion of the dictum in *Dowling* v. *Isthmian S.S. Corp.*, 184 F. 2d 758, that testimony in admiralty is to be taken in open court, except as otherwise provided *by the judge* (as he may happen to "feel" about it, *Dowling*, p. 773)—instead of "except as otherwise provided *by statute*" as Supreme Court Admiralty Rule 46 has long required and still requires—is a legal curiosity unsupported by any citation. As pointed out in *Mulligan* v. *U.S.*, 87 F. Supp. 79, 80-81 and *Mercado* v. *U.S.*, 184 F. (2d) 24, 28-29, it is a historical error to imagine that deposition-discovery was a part of the admiralty practice when the Supreme Court, in 1938, adopted Rule 26 of the Federal Rules of Civil Procedure, 28 U.S.C.A. or when, in amending the admiralty discovery rules in 1939, it continued the exclusion of deposition-discovery from admiralty practice by refusing to accept that rule for the Admiralty Rules. Though this court adopted the other discovery rules of the Federal Rules

[2] Judge Fee says, **Dowling** p. 772 n. 39; but the statute he refers to did not repeal it. 5 Stat. 518.

of Civil Procedure for admiralty it left Rule 26 where it is still subject to the proviso: "these rules do not apply to proceedings in admiralty", Rule 81(a)(1), F.R.C.P., 28 U.S.C.A.

(3) The Dowling opinion misinterprets the meaning of personal answer in admiralty practice.

The "personal answer" of a *party in admiralty*, mentioned in the *Dowling* dictum (as a reading of the decided cases it cites will show) was the answer in writing to the written libel. It was sworn to, and thus supplied proof on issues tendered. This was, and remains, the admiralty practice, Admiralty Rule 26, 28 U.S.C.A. Obviously it is not formal pleading by general traverse, confession and avoidance, special traverse on the *absque hoc, etc.*, as at common law. (Cf. *Chitty on Pleadings*.) Just as obviously, it is not "discovery" (as the *Dowling* dictum calls it) nor was it oral, and no ancient or modern admiralty case is cited in *Dowling's* notes that holds otherwise.

The old *Ecclesiastical* practice did allow an oral answer and a lot of other things, that no decided *admiralty* case ever accepted. If that ancient practice, rather than the Rules of the Supreme Court and the federal statutes, remained the measure of *admiralty* powers, we should find ourselves in some strange places. Discussing "The procedure of the *Ecclesiastical* Court [which] is called the Civil Law System" better historians than Judge Fee record:

> "But this is not all; for the witnesses would be examined in secret, *i.e.*, no one could be present but the witness under examination, the judge and the notary, the latter reducing the answers of the witness to writing." (Langdell, *Summary of Equity Pleadings*, Sec. 3, p. iii 1877)

"Plaintiff is, in all civil causes entitled to what are called 'Personal Answers' of the defendant on oath with this exception, that the defendant is not bound to answer any criminal matter * * * this stage of the cause corresponds with the plea at common law, *i.e.* it is an answer of fact to all and every the positions or articles of the libel (which, we have seen, resembles the declaration).

"The witnesses are examined secretly, and their depositions taken down by an examiner. * * *" (Burns, *Ecclesiastical Law*, Vol. III, p. 189)

(4) The Dowling opinion is in error on ascribing inherent powers for oral discovery to statutory district courts.

Petitioners' counsel undertakes to paraphrase (Brief, pp. 12-13) the *Dowling* dictum (*Dowling* v. *Isthmian S.S. Corp.*, 184 F.2d 758 at page 772) that "the courts of instance jurisdiction [meaning, we suppose, U. S. District Courts, which have none but statutory powers, *vide supra*, p. 17] could be deprived of authority to require *a party* [*sic*] to answer orally [an authority no statute gives the U. S. courts in admiralty, whether answering the libel, or interrogatories] according to the accustomed modes of procedure [oral answers to oral interrogatories for purposes of discovery and not in answer to issues of the libel are not found in any admiralty decision cited by Judge Fee] only by express prohibition, established by acts of Congress of Rule of the Supreme Court." That is Judge Fee's unsupported dictum, as he returns from wandering back through the centuries in the Ecclesiastical moon-shine! No court we know of has ever embraced those extraordinary ideas, before or since; they are rejected by the Second Circuit Court of Appeal in *Mercado* v. *U. S.*, 184 F.2d 24.

Petitioners' counsel rather plays down the thesis of this dictum to the effect that the Supreme Court has had express authority for a hundred years, to prescribe forms and modes of taking discovery—and has not exercised it because it "was satisfied with the existing flexible practice that then obtained." *Dowling, supra*, p. 764. (The Supreme Court certainly has exercised it, as we shall see.) The Supreme Court has had such powers; the district courts do not. The "flexible practice that then obtained" did not include, in England or here, deposition-discovery (distinct from depositions to furnish proof on the issues), and Judge Fee cites no case for his idea that any such practice obtained "in admiralty" for a hundred years or for five minutes. He puts forward an unsupported historical error; and *Mulligan* and *Mercado* call it what it is.

(5) Certain divergent district court opinion collected by petitioners is in error in holding that Admiralty Rule 32 C provides a basis for oral discovery in admiralty. This reasoning has been rejected by the Court of Appeals for the Second Circuit and rests on a false dilemma.

Brown v. *Isthmian S.S. Corp.*, 79 F. Supp. 701 (ED Pa. 1948) is representative of the district court opinion collected by petitioners. But, as pointed out by the Court of Appeals below, even *Brown* concedes that there was no instance known to that court of discovery deposition in admiralty. (R. 91) *Brown* was expressly disapproved in *Gulf Oil Corp.* v. *Alcoa S.S. Co.*, 1949 A.M.C. 1965 (S.D.N.Y. 1949) and again in *Mulligan* v. *U.S.*, 87 F. Supp. 79—and the doctrine of *Mulligan* was expressly approved by the Second Circuit Court of Appeals in *Mercado* v. *U.S.*, 184 F.2d 24.

The rejected view of certain district courts—thus rejected but still relied on by petitioners—travels on a false

dilemma asserted in *Brown* and quoted by petitioners (Brief p. 11). As the district judge there says, amended Admiralty Rule 32C provides for answers on some kind of oral examination; but it is simply not correct to conclude, as he there does, that this has to be the kind of oral examination allowed by Rule 26 (a) F.R.C.P., 28 U.S.C.A.—which "does not apply" in admiralty (Rule 81(a)(1) F.R.C.P., 28 U.S.C.A.) That is *not* "the only alternative," contrary to what the district judge there says. Oral examination in admiralty is under the *de bene esse* statute which Congress preserved for admiralty and for admiralty alone. That is the "other alternative" ignored by the judge in the *Brown* case. The *Mulligan* case spells this out; it was approved by the Court of Appeals, all as pointed out *supra*. Indeed, there are still more "other alternatives," as pointed out in *Gulf Oil Corp.* v. *Alcoa S.S. Co.*, 1949 A.M.C. 1965. (See also *Ellis* v. *Browning S.S.*, 11 F.R.D. 297 (W.D. N.Y. 1951); *Standard S. S. Co.* v. *U. S.*, 126 F. Supp. 586 (D.C. Del. 1954); *Havrisko* v. *U. S.*, 68 F. Supp. 771 (E.D. N.Y. 1946); *Kelleher* v. *U. S.*, 50 A.M.C. 319 (S.D. N.Y. 1950).)

3. District courts derive no power to grant depositions for discovery only in admiralty by virtue of Admiralty Rule 44.

The specious nature of petitioners' position becomes glaringly apparent upon examination of their argument upon this Court's Admiralty Rule 44 with which they begin at page 8 of their brief. They quote Rule 44 which provides in effect that in admiralty proceedings in cases *not provided for* by the Supreme Court's Rules or the statutes, the district courts may "regulate their practice," provided such regulations are not inconsistent with the Supreme Court's Admiralty rules.

Recognizing that rules of statutory district courts must have their source in a statute and cannot rise higher than their source, petitioners then state that "authority for Rule 44 is derived directly from" 28 U.S.C.A. § 2071, which they then quote.

a. Admiralty Rule 44 has a different statutory basis than Petitioners suppose, which commits to this Court the power to prescribe by general rules the mode of obtaining discovery in admiralty.

But that section grants to this Court and statutory courts alike no more than authority to prescribe rules "for the conduct of their business." This Court accordingly has prescribed the "Revised Rules of the Supreme Court of the United States," 28 U.S.C.A., governing its clerk and attorneys, its library, its docket, briefs, etc. District courts have different business but comparable rules to regulate it. The next sentence of Section 2071 is that "*such* rules" (*i.e.*, those regulating "the conduct of the business" of the court) "shall be consistent with acts of Congress and *rules of practice and procedure* prescribed by the Supreme Court."

Petitioners evidently feel the inadequacy of this statute, which allows all courts "to regulate the conduct of their business," to take Rule 44 beyond the plain meaning of that statute, for they say "*original* authority for Rule 44 is found under" 28 U.S.C.A. § 2073, which they then quote. However, this is the statute which says that, "the *Supreme Court* shall have power to prescribe *by general rules* * * * the practice and procedure in admiralty and maritime cases * * *." (Emphasis ours.)

Moreover, Sections 2071 and 2073 of 28 U.S.C.A., relied on by petitioners as the statutory authority for Rule 44 were not enacted until 1948 (62 Stat. 961); whereas Rule 44 was part of this court's Admiralty Rules adopted and promulgated in 1920. (254 U.S. 679 *et seq.*).

Statutes not enacted until 1948 are not the authority for a rule adopted in 1920.

b. This Court has provided elaborately for the mode of obtaining discovery in admiralty; discovery in admiralty is not a case "not provided for" by the Supreme Court's rules and is not comtemplated by Rule 44.

When Admiralty Rule 44 was promulgated in its present form in 1920 as part of a general revision of the Admiralty Rules of that year, the statute as to the rule making power in admiralty was 28 U.S.C.A. (Prerevision) sections 730, 731 (1941 Ed.).

The first of these sections defined the rule-making power of *this* Court. The other defined the rule making power of the *district* courts. *This* Court was given power as follows:

> "§730. **Regulation of practice of district courts by Supreme Court.** The **Supreme Court** shall have the power to prescribe, from time to time, **and in any manner not inconsistent with any law of the United States** the forms of writs and other processes, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, **of obtaining discovery,** of proceeding to obtain relief, * * *" (Emphasis ours.)
>
> 28 U.S.C. (Prerevision) §730 (1941 Ed.).

The other section, 731 defines the rule making power of the *district* courts very differently and with no mention of the mode of obtaining discovery:

> "§731. **Rules of practice in district courts.** The district courts may from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 make rules, and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and

making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevent of delays in proceedings."

28 U.S.C.A. (Prerevision) §731 (1941 Ed.).

From 1878 to June 25, 1948 (62 Stat. 992) these two sections of the prerevision Judicial Code were the basis of the rule making power in admiralty. It will be observed that the power to prescribe "the mode" of "obtaining discovery" was expressly given to the Supreme Court whose rules operate generally—not to local courts.

The evident purpose of Congress to secure general and uniform practices in the matter of discovery in admiralty is confessed even by Judge Fee, *Dowling* v. *Isthmian S.S. Corp.*, 184 F. 2d 758 at p. 764 and is referred to by petitioners (Brief, p. 13).

The Supreme Court under this statutory situation, in exercise of the power so conferred on it, did prescribe "the mode of obtaining discovery" in admiralty.

In 1939 this Court provided for interrogatories as follows:

Admiralty Rule 31.

> "Any party may serve upon any adverse party *written* interrogatories to be answered by the party served * * * the interrogatories shall be answered separately and fully *in writing* under oath. * * *"

(The full text of the above rule is given *supra*, p. 8).

This remains the form of the rule.

It is significant to the present case that this rule of 1939 superseded an earlier rule whose language would obviously have been read by Judge Fee (although no one ever so read it) to allow oral interrogation of a party on cause shown. The previous rule read in pertinent part as follows:

"Either party shall have the right to require the personal answer [*sic*] of the other * * * to all interrogatories propounded by him, it or them, in the libel answer *or otherwise, as may be ordered by the court on cause shown and required to be answered.*" (Emphasis ours.) (Old Rule 31, 254 U.S. 692. Cf. source note to the present Admiralty Rule 31, 28 U.S.C.A.)

The language quoted above and underlined was eliminated by this court in 1939 and replaced with the unequivocal language of Admiralty Rule 31 as first above quoted. Interrogatories in admiralty, even to a party, are to be "*written;*" and answers are to be "*in writing.*"

It would be a little difficult to devise a more cogent manifestation of the intent of this Court—the Court in which the governing act placed the power to prescribe the mode of obtaining discovery—that discovery by interrogation of a party should be written.

But the foregoing was by no means the only exercise of this court of the power expressly confided to it to prescribe the mode of obtaining discovery. Exceptions to interrogatories are to be heard by the court (Admiralty Rule 27, 28 U.S.C.A., adopted as amended in 1920). There is, by this Court's Rules in Admiralty, discovery and production of documents, Rule 32, adopted in 1939; physical and mental examination, Rule 32A, adopted in 1939; admission of facts and genuineness of documents, Rule 32B, adopted in 1939; punishment for failure to make discovery, Rule 32C, adopted in 1939; and finally, when the libellant or respondent was (a) out of the country, or unable, from (b) sickness or (c) other casualty to make answer to any interrogatory on oath or solemn affirmation at the proper time (*Vide*, Rule 31, *supra*), the court in its discretion could award a commission to take answers of the respondent or claimant

when and as soon as it may be practicable or may receive the verification by agent or attorney with like force and effect as if made by the party, Rule 33, adopted in 1844.

It is plain beyond debate that this Court acted in exercise of the power conferred on it by the statutes, § 730, 28 U.S.C.A. (prerevision) to prescribe, by rules, the "mode" of obtaining discovery. That power was expressly committed to *this* Court, the only court having power to make general rules. Acting in exercise of that power under § 730, *supra*, this Court provided an elaborate and considered code for admiralty discovery which represents the experience of years.

It was also under that statute that this Court adopted Rule 44 relied on by the petitioners. Rule 44 reads and has read since 1920:

> "Rule 44—**Right of trial courts to make rules of practice.** In suits in admiralty in all cases **not provided for by these rules or by statute** the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules." (Emphasis ours.)

After this Court has provided an elaborate code for obtaining discovery in exercise of its power over that subject matter expressly committed to it, it cannot be said that the mode of obtaining discovery is a case "not provided for" by the Supreme Court's Admiralty Rules. Eliminating earlier language that was not explicit as to whether interrogation of a party should be in writing, this Court replaced such language with the provision in effect ever since, calling in explicit terms for the interrogation of a party by "*written*" interrogatories and for his answers "*in writing.*" It is simply not true to say that discovery by interrogation of a party is "a case not

provided for by these rules." It is provided for—expressly, elaborately, at length, and with specified procedures and safeguards.

> *c. Oral examination under F.R.C.P. 26 is inconsistent with the mode of obtaining discovery in admiralty prescribed by this Court and is excluded by the proviso of Rule 44.*

Neither can it be true to say that when these admiralty rules have carefully provided for discovery by interrogation of a party on written interrogatories and written answers in specified modes and with particular safeguards it is not "inconsistent" therewith to interrogate him on oral interrogatories with oral answers on a deposition under Rule 26, Federal Rules of Civil Procedure.

Nor is this all.

At the time of this court's revision of the admiralty rules in 1920, Section 639, 28 U.S.C.A. (prerevision; R.S. § 863) provided for the taking of depositions. The primary provisions and the earliest were the provisions of the *de bene esse* acts, quoted by this Court in *Ex parte Fisk*, 113 U.S. 713, 722 and quoted in part herein, *supra* p. 2. The *de bene esse* acts were as fully applicable in proceedings in admiralty as to proceedings at common law and are still applicable to all admiralty proceedings and courts. (See for example, *Mercado* v. *U. S.*, 184 F. 2d 24, 27.) The taking of oral depositions as provided by the *de bene esse* acts was contemplated by other provisions of the prerevision judicial code and the revised statutes. (Also quoted in *Ex parte Fisk, supra.*) Section 635 (R.S. § 861) 28 U.S.C.A. (Prerevision) provided as follows:

> "§ 635. Proof in common law actions. The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

This court in 1920 adopted a parallel provision for admiralty, Admiralty Rule 46, 254 U.S. 698, which remains the law today:

> "In all trials in admiralty the testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or agreement of the parties."
>
> Admiralty Rule 46, 28 U.S.C.A.

The primary statute that "otherwise provided" for the testimony of witnesses was the *de bene esse* act. That statute, in Section 639 (R.S. § 863), 28 U.S.C.A. (prerevision; also 28 U.S.C.A. 1781) prescribes the conditions upon which depositions may be taken—*viz.*, when the witness resides more than 100 miles from the place of trial; is on a voyage at sea; and so on, through an elaborate catalog of specific circumstances under which depositions may be *taken*. (The succeeding section even prescribes the continuance of the conditions of Section 639 at the time the deposition is *used*.)

For law and equity this statute was superseded by Rule 26, Federal Rules of Civil Procedure; but that rule did "not apply to proceedings in admiralty", Rule 81 (a)(1), F.R.C.P. For admiralty, the *de bene esse* acts were not superseded. They remain in force.

When Congress in 1948 repealed other statutes that had been superseded in law and equity by the Federal Rules of Procedure (62 Stat. 991) it did not repeal the *de bene esse* acts. The reporter of this court's advisory commission on Federal Rules of Civil Procedure, speaking as Chief Judge of the Second Circuit, concedes that we may take it that this statute was deliberately preserved, *Mercado v. U. S.*, 184 F. 2d 24, 27 (CA-2, 1950).

The note preceding Section 1781, 28 U.S.C.A. (1950 ed.) states in part as follows:

> "Superseded for law and equity, the *de bene esse* acts were preserved for admiralty."

In 1939 this court also provided for letters rogatory in admiralty by Admiralty Rule 32C(e), re-establishing for admiralty, Section 711, 28 U.S.C.A. (prerevision), 44 Stat. 835.

This court's Admiralty Rules then provided, and continue to provide, a system for procuring testimony for proceedings in admiralty. That was not accidental. The provisions made to govern the practice in this respect are complete, far-reaching and minute. Elaborated now by the above rule for letters rogatory, these provisions are explicit—just as they were when the Revised Statutes made the like provisions for trials at common law—that in all trials in admiralty the testimony of witnesses shall be taken orally in open court "except as otherwise provided by statute, • • •." Admiralty Rule 46, 28 U.S.C.A.

In *Ex parte Fisk*, 113 U.S. 713, *supra*, the statutes provided that in the event of removal of a cause from a state court to a United States District Court, orders entered in the state court should stand, they also provided for the taking of depositions in district courts according to the practice of the state in which they sat. The State in the *Fisk* case was New York, which had adopted the prototype of all discovery examination statutes, and an order for pre-trial discovery examination had been entered in the State court before removal was completed. It was argued that a provision of the Revised Statutes (which became section 635 of the prerevision Judicial Code above quoted, p. 2) which required "proof" to be in open court, except as otherwise provided by statute,

was not "inconsistent" with examination for discovery before trial. (Counsel's argument to that effect is at p. 717 of 113 U.S. A precisely parallel argument that the provision of this Court's Admiralty Rule 46, requiring testimony to be taken in open court "except as otherwise provided by statute", is suggested by the district judge in *Republic of France* v. *Belships Company, Ltd.*, 91 F. Supp. 912, 913 (S.D. N.Y. 1950).) This Court rejected that argument in the *Fisk* case, saying that

> "No one can examine the provisions for procuring testimony in the courts of the United States and have any reasonable doubt that, so far as they apply, they were intended to provide a system to govern the practice in that respect in those courts. They are in the first place, too complete, too far-reaching and too minute to admit any other conclusion." *Ex parte Fisk*, 113 U.S. 713, 722, 723.

It would seem that the provisions of this Court's rules above described, with the *de bene esse* act preserved by Congress for admiralty alone, fit that language exactly.

This Court continued in the *Fisk* opinion:

> "But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted.
>
> "This mode is 'by oral testimony and examination of witnesses in open court except as hereinafter provided.'" (*Ibid*, p. 723)

Whatever the source of a rule for deposition-discovery examination—whether a state, or the Federal Rules of Civil Procedure (which "do not apply to proceedings in admiralty"), or the local rule of some district court—it was held by this Court to be inconsistent with the pro-

visions of federal law that provided their own elaborate system for procuring testimony.

d. This Court has deliberately refrained from importing deposition discovery into admiralty practice.

There remains a concluding aspect of the matter.

In prescribing the mode of obtaining the discovery in admiralty under the powers vested in it by Section 730, 28 U.S.C.A. (prerevision) this Court in 1939 adopted, *in haec verba*, seven of the Federal Rules of Civil Procedure. However, this Court and Congress have conspicuously refrained from adopting Admiralty Rule 26, F.R.C.P. providing for discovery deposition. That is pointed out by the United States Court of Appeals for the Seventh Circuit in the opinion below (R. 88).

Judge Clark, writing in *Mercado* v. *U. S.*, 184 F. 2d 24, recognized the legal consequences of this fact. He undertook to intimate that it was more by accident than design, but the passage of the years have now made it plain that this was no accident. To quote Judge Rifkind:

> "The omission of so important a provision could hardly be accidental."
>
> *Mulligan* v. *U. S.*, 87 F. Supp. 79.

e. Whether deposition discovery should be imported into admiralty practice involves questions of policy not appropriate for local rule-making nor for the judicial process.

The deposition practice under the *de bene esse* act, *which was not repealed*, has worked well. This Court's Admiralty Rules preclude discovery depositions unless by agreement, and this prevents them from becoming a weapon of harassment in the admiralty system where,

unlike law and equity, the characteristic cause is brought wherever the vessel may be—not where the parties reside.

Practical aspects of the matter do not commend a helter-skelter of locally prescribed rules of obtaining discovery in admiralty, according to the various conceptions of legislative policy which may occur to district judges and which will differ from district to district, port to port and coast to coast. Vessels that are in New York today are in New Orleans a week hence. Forum-shopping on the important matter of discovery in admiralty commends itself to none. Like the statutes which they replaced on June 25, 1948, Sections 2071 and 2073, 28 U.S.C.A. contemplated national uniformity as to rules of practice and procedure of admiralty law. By Section 2071, 28 U.S.C.A., district court rules are for their local housekeeping, *i.e.*, "the conduct of their business." The power to make "general rules of practice and procedure" is given to this Court, to be effective only after submission to Congress under Section 2073, 28 U.S.C.A.

Commenting on this statute, the Court of Appeals below points out:

> "Certainly one of the purposes the Congress must have intended was to achieve uniformity in admiralty practice and procedure."
>
> > "'The admiralty and maritime jurisdiction being, by the constitution, entirely transferred from the states to the general government and made a purely federal jurisdiction, of limited extent and peculiar character, it was from the outset deemed desirable that it should be uniform throughout the states. * * *' 2 Benedict, Admiralty 2 (6th ed. 1940)." (R. 87)

CONCLUSION.

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 156

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois,

Petitioners,

vs.

H. LESLIE ATLASS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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CITATIONS.

BRIEF ON MERITS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 156

HON. JULIUS H. MINER and HON. EDWIN A. ROBSON, Judges of the United States District Court for the Northern District of Illinois,

Petitioners,

vs.

H. LESLIE ATLASS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE PETITIONERS.

A.

REFERENCE TO REPORTS OF OPINION.

The opinion of the Court of Appeals is reported at 265 F. 2d 312, (R. 84 to 96 incl.).

B.

STATEMENT OF JURISDICTIONAL GROUNDS.

The judgment of the Court of Appeals was entered March 31, 1959. (R. 97) The Petition for a Writ of Certiorari was filed on June 29, 1959, and was granted October 12, 1959. (R. 98) Jurisdiction of this Court rests on Title 28 U.S.C.A. 1254 (1).

C.

QUESTIONS PRESENTED FOR REVIEW.

1. Do the various United States District Courts have the power to issue an order upon cause shown for the taking of oral pre-trial depositions in admiralty actions, whether the power be inherent, or emanate from the federal statutes, Supreme Court Admiralty rules, or admiralty custom and usage?

2. Are United States District Court admiralty rules which permit discovery practice and allow pre-trial oral discovery depositions invalid as being inconsistent with the existing United States statutes and United States Supreme Court Admiralty rules?

D.

UNITED STATES CONSTITUTION, STATUTORY PROVISIONS AND RULES OF COURT INVOLVED.

Constitution of the United States:

1. Article III:

Sec. 2. "The judicial Power shall be extended to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . .".

2. 28 U.S.C.A. Sec. 2073 which provides:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the District Courts of the United States and all courts exercising admiralty jurisdiction in the territories and possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until after they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court."

3. 28 U.S.C.A., Sec. 2071. The statute reads:

"The Supreme Court and all courts established by act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with acts of Congress and rule of practice and procedure prescribed by the Supreme Court."

4. Rule 44 of the Supreme Court Admiralty Rules. Rule 44 reads as follows:

"In suits in admiralty and all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

5. Rule 32 C of the Supreme Court Admiralty Rules. Rule 32 C reads as follows:

"Rule 32C. Refusal to make discovery—consequences

"(a) Refusal to answer. If a party or other deponent refuses to answer any question propounded upon oral

examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under any provision of law, or upon the refusal of a party to answer any interrogatory submitted under Rule 31, the proponent of the interrogatory may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

"(b) Failure to comply with order (Pertinent section)

"(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court."

6. Rule 32 of the local admiralty rules of the District Court for the Northern District of Illinois. Rule 32 reads as follows:

"32. Depositions: Taking and Use of. The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute and except that their use shall be limited as hereinafter set forth.

"Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of evidence, may be used aganist any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a witness, whether or not a party, may be used by any party for any purpose, if the court finds: 1, That the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is bound on a voyage to the sea, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the depositions; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.

"(3) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of which is relevant to the part introduced, and any party may introduce any other parts.

"Substitution of parties does not affect the right to use depositions previously taken; and when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

"The rule may be superseded by an agreement of the parties approved by the Court."

E.

STATEMENT OF THE CASE.

On October 26, 1956 two seamen returning from shore leave, Kurt Darr, age 47, and Clem Muth, age 41, were drowned in the Detroit Harbor Basin while crew members of the Yacht "SIS" due to the alleged failure to have a means of ingress and egress to said vessel and the failure to have adequate rescue and resuscitation appliances. They were the only casualties in this occurrence. On April 23, 1957, H. Leslie Atlass as owner and operator of the vessel filed an admiralty action for exoneration from or limitation of liability. On April 24, 1959, a monition was entered against all parties to prevent them from seeking relief in law. The personal representatives of the Estates of Kurt Darr and Clem Muth duly filed their respective claims and answers to said action.

A motion was made by the claimants with cause shown to take the oral pre-trial discovery depositions of the petitioner and others. (R. 19, 20, 21). The Hon. Judge Julius H. Miner, Judge of the United States District Court (to whom this case was assigned), issued an order for the taking of said depositions. (R. 15, 16) After the order for the taking of the depositions was signed, the cause was transferred to the Hon. Edwin A. Robson, (R. 38). H. Leslie Atlass then filed for a Writ of Mandamus or Prohibition against the aforementioned judges in the United States Court of Appeals for the Seventh Circuit. (R. 1 to 4). On March 31, 1959, the aforementioned court of appeals ordered the issuance of said writ against both petitioners herein, and all other judges of the United States Court for the Northern District of Illinois. (R. 97)

A Petition for a Writ of Certiorari was then filed by the personal representatives of the Estates of Kurt Darr and Clem Muth on June 29, 1959, and granted by this Court on October 12, 1959. (R. 98)

ARGUMENT.

I. The Right — Its existence as illustrated by the Constitution and Statutes.

A. District Courts have the power to order pre-trial oral discovery depositions under the authority granted by General Admiralty Rule 44.

Rule 44 of the General Admiralty Rules provides as follows:

> "*Right of Trial Courts to Make Rules of Practice* In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

Authority for Rule 44 is derived directly from the following congressional language: Title 28, United States Code, Section 2071.

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Original authority for Rule 44 is found under Title 28, United States Code, Section 2073, which provides:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the District Courts of the United States and all courts

exercising admiralty jurisdiction in the territories and possessions of the United States.

Such rules shall not abridge or modify any substantive right.

Such rules shall not take effect until after they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court."

General Admiralty Rule 44 is concise and unambiguous as it clearly authorizes the District Courts to regulate their "Practice", and make rules for the administration of justice. The authority for the Supreme Court to delegate to the District Courts the right to make local rules is also unambiguous when read with statutes under Title 28, United States Code, Sections 2071 and 2073.

We further contend that General Admiralty Rule 44, when read in the light of the above mentioned statutes, provides sufficient authority to permit District Courts to direct that pre-trial oral discovery procedures may be employed. The title of the rule shows that the rule relates to "Practice". A discovery rule is a rule of practice and a rule allowing oral discovery could hardly be termed inconsistent with the General Admiralty Rules and in particular when those rules already provide the penalties to implement it in its use and application. (Supreme Court Admiralty Rule 32 C *supra* pp. 3-4)

It appears to us that the availability of oral discovery in Admiralty has been implicit in the General Admiralty Rules ever since their revision in 1939 through the addition of General Admiralty Rule 32 C. Congress gave the Supreme Court the power to permit oral discovery and Congress also legislated that the Supreme Court could leave matters such as oral discovery to the discretion of the District Courts. In turn, the Supreme Court has both put oral discovery within the discretionary powers of the District Court and has appointed it by plain implication as a recognized mode of discovery in a General Admiralty Rule.

This court, in *United States* v. *Procter and Gamble*, 356 U.S. 677, 78 S. Ct. 983, 986, stated:

> "Modern instruments of discovery serve a useful purpose, as we noted in *Hickman* v. *Taylor*, 329 U.S. 677, 67 S. Ct. 385, 91 L. Ed. 451. They together with pre-trial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

Justice Cardozo, in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 53 S. Ct. 736, 737, said:

> "The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role."

We note the following pertinent language in General Admiralty Rule 32 C:

> "Refusal to make discovery . . . consequences.
>
> (a) Refusal to answer. If a party or other deponent refuses to answer any question propounded

upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer . . ."

There is no other reference regarding the taking of an oral deposition in the rules.

In *Brown* v. *Isthmian Steamship Corp.*, 79 F. Supp. 701, 702, (E. D. Pa., 1948) the district court, after considering the above quoted provisions of Rule 32 C, said:

> "It is inconceivable that the Supreme Court by means of the elaborate and detailed terms of Rule 32 C would have given a suitor in admiralty a method of enforcing a right that did not exist. It seems to me out of the question to impute a solecism of this kind to the Court and the distinguished group of admiralty lawyers who advised with the Court in drafting the Rules. That, however, would be the only alternative were I to hold that the procedure was not according to the usage of Courts of admiralty."

We agree with this reasoning. Especially is this true when the rule is considered in its entirety. It becomes readily apparent that there was a definite purpose and reason for it. The purpose being to insure that oral pre-trial discovery depositions were enforceable and therefore allowable. It compels the conclusion that this court contemplated the use of oral discovery in admiralty.

This court's construction of its Admiralty Rule 32 C is therefore sought.

B. The District Court for the Northern District of Illinois has the power to order oral pre-trial discovery depositions by authority of its local admiralty rule 32.

Local admiralty rule 32 (*supra* pp. 5-6) clearly authorizes the taking of pre-trial oral depositions in admiralty. It does not enlarge upon or detract from any pre-existing substantive right. It merely provides the court with a procedural tool for the processing of its business and the administering of justice more proficiently.

Local admiralty rule 32 in no way legislates by judicial pronouncement, nor is it in any manner inconsistent with any of the Supreme Court Admiralty Rules.

A similar local rule (Local admiralty rule 32, formerly rule 46, Southern District of New York) has been upheld in the following cases:

Ludena v. *The Santa Luisa*, 95 F. Supp. 790, 791, (S.D., N.Y. 1951).

Republic of France v. *Belships Co., Ltd.*, 91 F. Supp. 912 (S.D., N.Y. 1950), mandamus denied 184 F. 2nd 119 (C.C.A. 2, 1950).

II. The Right — Its existence as illustrated by decided cases.

The leading case decided by a Court of Appeals prior to the present case on the right to take pre-trial depositions is the case of *Dowling* v. *Isthmian Steamship Corp.*, 184 F. 2nd 758, (C.C.A., 3, 1950). This decision was written by the Honorable Judge James Alger Fee. It is exhaustive and well briefed. It involved a factual situation where the plaintiff appeared, upon notice served, for the purpose of submitting to an oral pre-trial deposition and refused to be sworn under oath or submit to oral examination.

This case clearly holds that a district court has the right to order a party to submit to an oral pre-trial deposition. It holds that this right is based on inherent powers vested in a court of admiralty and further alludes to additional authority vested in the district courts by reason of (1) The Federal Constitution, (2) General Admiralty Rule 44, (3) Title 28 U.S.C., Sec. 2071, and (4) Title 28 U.S.C., Sec. 2073. The Court at page 764 says:

> "In order to provide for uniformity in certain basic procedures, the Congress in 1842 gave to the Supreme Court of the United States the power to regulate practice, including the obtaining of discovery by General Rules binding upon the lower federal courts. The Act in part provides that:
>
> > '. . . the Supreme Court shall have full power and authority . . . to prescribe . . . in suits . . . in admiralty . . . the forms and modes of taking and obtaining evidence, and of obtaining discovery . . . and generally to regulate the whole practice of said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.'
>
> This power has been continued by Congress in the most recent Statute, (28 U.S.C.A. 2073) which provides in part:
>
> > 'The Supreme Court shall have the power to prescribe, by General Rules, the forms of process, writs, pleadings and motions and the practice and procedure in admiralty and maritime cases in the District Courts of the United States.'
>
> It thus appears that there was a great body of procedure and practice which was adopted for the admiralty courts by Statute and which these follow today. For one hundred years, the Supreme Court

has had express authority to prescribe and regulate the forms and modes of taking and obtaining evidence and of obtaining discovery. The fact that this power has not been exercised does not indicate that there were no methods of obtaining discovery by the procedure of civil law. It merely indicates that the Supreme Court was satisfied with the existing flexible practice which then obtained."

and again at page 773: (*Dowling supra*)

"It is urged that the Supreme Court of the United States has evinced an intention to withhold from District Courts the power to require parties to undergo examination by oral deposition. But the inference is only that the Supreme Court has been satisfied with the exercise of traditional powers of the Admiralty Courts, and has not seen fit to interfere."

There has been an attempt made in the present case to confuse the court below. It has been urged that whenever the word "deposition" is used in admiralty it is made with reference to only one thing, namely, the *de bene esse* statutes. It is interesting to note that *de bene esse* depositions are not, and never have been the only type of deposition exclusively associated with admiralty. Summarizing from the decision in the *Dowling* case (*supra*) we extract the following conclusion: Congress extended the ancient practice of depositions *de bene esse* under the familiar conditions to all the courts of the United States, and at the same time expressly preserved the power of appropriate courts to order testimony taken (1) *in memoriam rei perpetuandum*, (2) under *dedimus potestatem*, and (3) to issue letters rogatory. The court further pointed out that permitting the taking of depositions *de bene esse* was not a limitation upon

the power of the federal courts to have testimony taken in other ways, namely, before a commissioner and by deposition *viva voce*. The methods were never mutually exclusive, but, by the express terms of the law, existed side by side. The statute requiring proof to be taken by word of mouth has long been repealed, but this mode of procedure has remained constant in the federal courts, both on trial and either deposition or commission. That subsequently, the enactment confirming the use of *dedimus potestatem* and letters rogatory was repealed, but that this established no barrier to the customary practices of the Admiralty Court. The courts of instant jurisdiction could be deprived of authority to require a party to answer orally according to the accustomed modes of procedure only by *express prohibition*, established by acts of Congress or Rules of the Supreme Court.

Another significant quotation with reference to *de bene esse* depositions can be found in the case of *Republic of France* v. *Belships Company, Ltd.*, 91 F. Supp. 912, 913 (S.D., N.Y. 1950), mandamus denied 184 F. 2d 119 (C.A. 2, 1950). District Court Judge Holtzhoff said:

> "The general rule, however, regulates only the manner in which the trial shall be conducted. It does not bear on matters preliminary to the trial. Under modern practice, depositions may be taken for purposes of discovery as well as for use at the trial. *It necessarily follows, therefore, that by local rule, the District Court may permit the taking of depositions, since their use for discovery do not contravene the general rule.* The person taking the depositions is not required to specify the manner in which they are to be used." (Emphasis added)

In this case the judge permitted pre-trial oral depositions of witnesses under a local rule (Local Admiralty Rule 46, S.D. N.Y. now Local Admiralty Rule 32) almost verbatim to the one involved in the instant case which was held invalid by the Court below.

An interesting situation arose in 1930, in the case of *Cleona-Joseph C. Reichert*, 37 F. 2d 599, (S.D. N.Y. 1930).

The particular problem being considered by the Court was whether a claimant of one of two vessels sued jointly for a maritime tort might require the claimant of the other vessel to answer interrogatories addressed to it.

At that time there were no specific rules pertaining to the situation. Judge Woolsey, at p. 600 said:

> "In the first place, it must be remembered that, fortunately, admiralty practice is plastic. It is largely judge-made, and consequently not technical—in fact, it is less technical than equity practice. Broadening from precedent to precedent, and based on a wisely administered convenience, admiralty practice has always been prepared to cope with new situations as they have arisen." (Citing cases.)

It is interesting to observe that Judge Woolsey in allowing the interrogatories also found support in the present Rule 44 of the General Admiralty Rules to which we have already alluded earlier in this Brief. He said:

> "Whilst the practice thus formed on precedent has from time to time been embodied in rules by the Supreme Court which have caused a wise procedure in one court to be made universal in the admiralty courts of the United States, there has never been any tendency in the rules which the Supreme Court has promulgated to limit the freedom of the District Courts in adopting new rules or principles of admiralty practice on appropriate occasion, provided the practice adopted does not conflict with the Supreme Court rules.

"The present Admiralty Rules of the Supreme Court, promulgated December 6, 1920, to take effect March 7, 1921, 254 U. S. 698, 40 S. Ct. xvii, contain, as Rule XLIV, the following:

> 'In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.'

"This rule had its prototype in Rule XLVI of the Admiralty Rules of the Supreme Court which were in force before March 7, 1921.

There is not anything in the rules of the Supreme Court, or of this court, which controls the situation here found. I feel, therefore, that I am quite free to use my discretion in dealing with this new point in admiralty practice, and that it is my duty to exercise the power which I hold in trust for the benefit of litigants and to adapt admiralty procedure in this case to the practical needs of justice. *Cf. The Alaska* (D. C. 40 F. 836, 838)."

We believe that Judge Woolsey's pronouncements would be equally applicable in justifying oral discovery.

The question of whether pre-trial depositions are permissible in admiralty practice is not an original one; various district courts have been faced with this query.

The following decisions uphold the right to take oral pre-trial depositions, irrespective of the existence of a local rule authorizing such practice, basing the right on this court's Admiralty Rule 32, C.

Bunge Corp. v. *S.S. Ourania Gounaris*, 1949 A.M. C. 744 (S.D., N.Y., 1949).

The Edmund Fanning, 88 F. Supp. 895 (S.D., N.Y. 1949).

Brown v. *Isthmian Steamship Corp.*, 79 F. Supp. 701 (E.D., Pa., 1948).

The Ballantrae, 1949 A.M.C. 1999 (D.N.J., 1949).

Galperin v. *United States*, 1949 A.M.C. 1907 (N. D. N.Y., 1949).

Ludena v. *The Santa Louisa*, 95 F. Supp. 790 (S. D., N.Y., 1951).

Another group of decisions hold that this type of deposition is not permissible in the absence of a specific local rule authorizing same. These decisions may be found in the following cases:

Mulligan v. *United States*, 87 F. Supp. 79 (S.D., N.Y., 1949).

Gulf Oil Corp. v. *Alcoa Steamship Co.*, 1949 A. M.C. 1965 (S.D., N.Y., 1949).

Kellpher v. *United States*, 1950 A.M.C. 319 (S. D., N.Y., 1950).

It is important to note that although there is a split of authority as to whether Supreme Court Admiralty Rule 32 C authorizes by implication the taking of depositions for purposes of discovery, not one of the above cases intimated that the taking of such depositions would be in conflict with the Admiralty Rules of the Supreme Court or with the *de bene esse* statutes. Even in those cases where the courts have refused to allow the taking of depositions, the decisions were based solely upon the lack of explicit local authorization which, of course, is not lacking in the instant case.

III. The Right — Its Practical Rationale.

Two men in their mid-forties residing in the vicinity of Chicago, Illinois, were drowned in the Detroit Harbor Basin, while employed as crewmen on a yacht. They were survived by their respective widows and six minor children, each decedent leaving three.

All of the material witnesses at the scene of the occurrence in question were employees of the yacht owner, H. Leslie Atlass.

The matter presently is in admiralty as a result of a Limitation proceeding invoked by the yacht owner (46 U.S.C. 181, *et seq.*). Actions at law under the "Jones Act" (46 U.S.C. 688) have been filed and enjoined from proceeding.

The respective legal representatives for the survivors will be required to produce evidence to prove their respective cases by a preponderance or greater weight of evidence.

It is virtually impossible to adequately prepare a case for trial either in admiralty or at law where all the material witnesses are under the control of the employer yacht owner, or defendant, without resorting to the pre-trial practice of oral discovery.

Some times helpful facts may be obtained from the police or the Coast Guard. In this instance they are of little or no value. Names of witnesses may possibly be obtained through written interrogatories served upon the yacht owner. The witnesses, under the above circumstances, generally will refuse to discuss relative facts or give pertinent information to the proctor representing the family of a deceased seaman.

How can any proctor adequately represent his clients under these conditions? How can true justice be accorded

the decedent's survivors if the facts are to remain obscure?

Pre-trial discovery procedures cannot and must not be denied if justice is to prevail.

The situation may well be reversed. The moving party may be in possession of all the pertinent information and the defendant with nothing upon which to prepare a defense. This is common where the United States Government is a defendant in admiralty actions, usually in cases involving injuries to seamen.

Admiralty litigation, insofar as it requires the assistance of the discovery processes, is no different from civil litigation in the Federal Courts. It is true that the bulk of admiralty litigation, until recent times, involved cargo and collision damage where oral discovery was not of prime importance because the parties to the suits were not the actors who had personal knowledge of the incidents or circumstances from which the litigation arose.

For almost the past two decades a growing trend has developed under which a great portion of admiralty suits now concern matters in which at least one of the litigants was the actor directly involved. Interrogatories are no longer the most effective way of obtaining adequate discovery.

In litigation involving personal injuries or wrongful death no two sets of circumstances are alike. Information required for or in behalf of claimants regarding the circumstances of such accidents vary with the accident. A response to one question prompts another question. Discovery can only be adequately obtained orally. Oral discovery is rapid. It is less burdensome to everyone

than written interrogation. It is, in most cases, more useful as an effective weapon for truth at the time of the trial, because the answers are spontaneous, unlike answers to written interrogatories which are prepared in the office of the opposing proctor in formal language unnatural to the answering party.

Discovery pre-trial depositions serve a further purpose. They eliminate the element of surprise. They give both parties the same opportunity to obtain essential information. They give the legal representatives of the litigants the opportunity of facing the witnesses, evaluating the witnesses, their testimony, their actual knowledge of facts, whether the same be personal to the witness or based upon hearsay, as well as other information and whether the same is helpful or detrimental to the parties litigant.

The practical effect of pre-trial oral depositions has been to promote justice as well as a greater disposition of cases. This has been accomplished through settlement as well as shortened trials.

The pre-trial deposition eliminates unnecessary witnesses and testimony, and clarifies the issues necessary for the trial.

No one denies that pre-trial oral depositions are beneficial and necessary under today's pre-trial practice. Even the Court below which held pre-trial oral depositions were not permissible in admiralty admitted that such a procedure was desirable (R. 95). They only questioned the right to take them without express legislative pronouncement (R. 95).

What further legislative pronouncement need there be? Article III, Section 2, of the Constitution of the United

States confers the power to hear admiralty cases in the Federal judiciary. Congress gave the Supreme Court of the United States the right to regulate practice and procedure in admiralty cases (28 U.S.C.A. 2073). Congress further gave the Supreme Court and all Courts established by Congress the right to prescribed rules of practice to conduct their business (28 U.S.C.A. 2071). The Supreme Court gave the right to take pre-trial oral depositions by adopting Admiralty Rule 32 C. The Supreme Court gave the District Courts the right to regulate their Admiralty practice by adopting Admiralty Rule 44. The Local District Court (Northern District of Illinois) adopted the pre-trial oral deposition practice by passing local rule 32 (Northern District of Illinois, Admiralty Rule 32). None of the above rules interferes with substantive rights. They relate to practice and procedure only. Pre-trial oral discovery depositions specifically pertain to practice and procedure and were adopted to promote justice and to enable the Courts to conduct their business more efficiently.

CONCLUSION.

Oral discovery is a tool the availability of which is implicit in Supreme Court Admiralty Rule 32 C. It may properly be permitted under the terms of Supreme Court Admiralty Rule 44 which derives its authority from Article III, Sec. 2, Constitution of the United States, 28 U.S.C.A. 2071 and 28 U.S.C.A. 2073 and which itself is the authority for local Northern District of Illinois Admiralty Rule 32.

The Courts have consistently emphasized the liberality of admiralty practice. In the course of interpreting the

various revisions of the Rules they have held that the Admiralty Rules wherever possible shall be given the same non-restrictive construction as the civil rules. They have held specifically that oral examination is a right accorded by the Admiralty Rules.

All practical considerations point to the usefulness and necessity for oral discovery in admiralty. In the field of discovery practical factors should be given much weight. It is therefore reasonable to conclude that oral discovery was contemplated by the Supreme Court and within its given authority and is within the permissible discretion of the district courts to allow.

The judgment of the Court below should be reversed and this matter remanded to the District Court for the Northern District of Illinois with instructions to proceed in accordance with the order entered by the Honorable Julius H. Miner, judge of said court. (R. 15, 16)

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